ONTARIO
LABOUR RELATIONS BOARD
REPORTS

January/February 2010

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LABOUR RELATIONS BOARD
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A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

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EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

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1. Rainbow Concrete Insdustries Ltd.; Re International Union of Operating Engineers, Local 793 and Ontario Labour Relations Board 218

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Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Practice and Procedure – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD 92

Bargaining unit – Certification – Employee – Judicial Review – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

RAINBOW CONCRETE INSDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND ONTARIO LABOUR RELATIONS BOARD 218

Bargaining Unit – Certification – Status – This application raised two issues: whether the Union's proposed bargaining unit improperly excluded five yard dispatchers; and whether S and B were employees at the time of the vote – The Board noted that the

Union's proposed bargaining unit need not be the best possible, but its configuration should be viable without causing serious labour relations problems – There were several considerations: the dispatchers would be the only full-time employees in the distribution centre not represented; they had little prospect of attracting a trade union; there would be fewer work opportunities for bargaining unit members because many of the dispatchers were sourced from bargaining unit positions; it was a condition of employment that bargaining unit employees cover the dispatcher positions; and a dispatcher position was a logical placement for employees with physical restrictions and/or who were in need of accommodation due to disability – The Board held that the Union's proposed exclusion of the yard dispatchers created undue fragmentation – As for the two remaining disputed employees, the Board determined that S, on maternity leave of finite duration with a statutorily protected right to return to her position, was an employee at the time of the vote, but B, away from the workplace, earning no wages, for almost twenty months, was not – B's continued group benefit coverage and employee discount were not evidence of a substantial connection to the workplace – Ballots to be counted in accordance with Board decision

HUDSON'S BAY COMPANY; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA).. 63

Certification – Bargaining unit – Employee – Judicial Review – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

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HUDSON'S BAY COMPANY; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA) 63

Certification – Construction Industry – Timeliness – Because of a defective initial delivery (by fax) of one of two applications for certification, and the subsequent delivery of the application by courier, the employer asserted that the application was untimely – The Board (differently constituted) ruled on the delivery some three weeks after it was actually made – The present panel held that the employer was required to file its response and Schedule A within two days of the delivery of the application – The Board rejected the employer's position that the application for certification was not "valid" until the Board exercised its discretion to extend the time for delivery: once filed with the Board, the application was always valid – The employer's failure to provide a timely response prejudiced the applicant's ability to ascertain where employees were working on the application date – One certificate issued; second matter continues

JAY-DEE CONCRETE FORMING, VANSMIT LTD. O/A; RE LABOURERS' INTERNATONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL 71

Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Intimidation and Coercion – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 1

Construction Industry – Alteration of Jurisdiction – Interference with Trade Union – Practice and Procedure – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

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450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 1

Construction Industry – First Contract Arbitration – Practice and Procedure – Reconsideration – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 20

Construction Industry – Interim Relief – Intervenor – Unfair Labour Practice – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC 173

Construction Industry – Interim Relief – Unfair Labour Practice – During the course of a LIUNA investigation into the operations and affairs of Local 183, the Local complained that LIUNA was interfering with Local 183's ability to perform its duties – The complaint alleged that the investigator refused to disclose reasons for the investigation, the source of the information that instigated the investigation, or when the investigation would be completed – Local 183 said the investigator was intrusive and interfering with its autonomy by requesting huge volumes of original documents including material that encroached on its executives' personal lives and by ordering Local 183 to reinstate employees who they say were laid off for good reasons – The Board found that it has jurisdiction to make interim orders concerning procedural matters only and it must be satisfied that the order(s) requested are necessary to preserve the processes of the Board until the hearing in the Main Application is concluded – Local 183 was seeking to restrain LIUNA's activities without the necessary connection between these activities and the need to protect the Board's process interests being present – Unlike Local 183's 2004 application which the Board distinguished, this investigation was not initiated following filing of an application; it had been ongoing at the time the Main Application was filed – The investigation was not commenced in a way that was an attempt to or would have the effect of interfering with the Board's processes – The Board was not satisfied that the investigation would have any significant impact on Local 183's ability to carry out its statutory obligation to bargain – Application dismissed

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C., AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD 85

Employee – Bargaining unit – Certification – Judicial Review – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

RAINBOW CONCRETE INSDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND ONTARIO LABOUR RELATIONS BOARD 218

Employee – Employer – Health and Safety – These applications concern the health and safety of paramedics (employees of Essex represented by CUPE) in relation to communications systems which the MOHLTC has the sole and exclusive responsibility to provide and operate – There were six issues over which Essex and CUPE disagreed with the MOHLTC: the need for a second portable radio on an ambulance crew so that both crew members would have a portable radio; testing emergency buttons on the radios; preventative maintenance of the radios; flagging of potentially dangerous addresses; mike to mike functions on cell phones; and information on defects in the system – The Board reviewed the factual context, the hazards faced by paramedics, and the MOHLTC's role with respect to the provision of ambulance services in Essex – The Board found that while MOHLTC was not the employer of the paramedics, it did have some of the obligations of an employer under the OHSA to the paramedics – The Board found a high level of integration between the communications and dispatch functions performed by the MOHLTC and the service functions performed by Essex – The Board noted that the paramedics were under the constant direction and control of [MOHLTC's] Central Ambulance Communication Centre from the beginning to the end of their shifts – After an extensive review of the case law, the Board found the integration of these systems was sufficient to impose upon the MOHLTC some of the obligations of an employer in relation to the paramedics–given that the contiguous sphere of operations with Essex meant that MOHLTC's activities could pose a risk of harm to the paramedics – Alternatively the Board found the MOHLTC, although a non-natural person, could be a supervisor under the Act, and given the authority (complete and exclusive control over the communications system it requires the paramedics to use) it exercised over the paramedics, it was their supervisor – The Board went on to find that the MOHLTC did breach certain obligations with respect to the six issues as an employer (and alternatively as a supervisor) in relation to the paramedics with respect to the communications systems – Declarations, orders and directions made

MINISTRY OF HEALTH AND LONG-TERM CARE, LAND AMBULANCE PROGRAMS; RE CUPE LOCAL 2974.1 AND R. TAGGART, INSPECTOR; RE COUNTY OF ESSEX-WINDSOR 108

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MINISTRY OF HEALTH AND LONG-TERM CARE, LAND AMBULANCE PROGRAMS; RE CUPE LOCAL 2974.1 AND R. TAGGART, INSPECTOR; RE COUNTY OF ESSEX-WINDSOR 108

Employment Standards – The employer sought review of an order to pay overtime to its former executive chef – The Board found that the employee's work was supervisory or managerial in character so that he would normally be exempt from the overtime provisions of the Act – The Board further determined that the chef's assisting the line cooks during peak hours was irregular or exceptional and did not remove him from the exemption to overtime pay – However, the Board considered, for the first time, the significance of s. 22(9) of the Act, where an employee's time is divided between exempt work and non-exempt work and includes hours that would qualify for overtime pay – The Board held that the chef was entitled to overtime for those weeks where he spent more than 50% of his time performing tasks that were not supervisory or managerial – Application allowed in part

GLENDALE GOLF AND COUNTRY CLUB, LIMITED; RE MASSIMO SANAGO AND DIRECTOR OF EMPLOYMENT STANDARDS 50

Employment Standards – The employer sought review of an order to pay compensation for alleged violations of the pregnancy provisions of the *Employment Standards Act, 2000* – The employee worked as a customer service representative for the employer who operated a call centre – Employees were engaged in campaigns handling either inbound calls (assisting callers with purchases they had already made) or outbound calls (offering products for sale to current or new customers) – The employee's work history showed that she had worked almost exclusively on the inbound side of the operation prior to her last leave – When she returned from her leave, the employer was winding down two inbound campaigns and assigned the employee to outbound work – Following several months in the new position, where the employee performed less successfully than her colleagues, she was terminated – The employer conceded that the employee was entitled to termination and severance pay, but challenged the order for compensation – The Board found that the inbound and outbound position were not substantially and qualitatively the same, and the employee held an inbound position when her leave commenced – At her return, there was no inbound position to which she could return – The Board held that the outbound position was sufficiently comparable to the inbound position to fulfil the employer's obligations to place the employee following her leave – Order amended accordingly; termination and severance pay payable

TRG CUSTOMER SOLUTIONS INC.; RE AIMERANCE KABONGO AND DIRECTOR OF EMPLOYMENTS STANDARDS 190

First Contract Arbitration – Construction Industry – Practice and Procedure – Reconsideration – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 20

Health and Safety – An order was issued requiring Xstrata to have the first aid rooms located at each of two of the employer's mines in the charge of two different first aid attendants – The Board, differently constituted, dismissed Xstrata's applcation to suspend the operation of the Order pending disposition of this appeal – The Board found that the regulation used the term "readily available" not "immediately available" and there was nothing in the regulation precluding an employer from having two first aid rooms associated with two underground mines in the charge of the same individual when it is unlikely that first aid attendant will be required to administer first aid at the same time in two locations – The Board found that because the mines are not in production and there were relatively few employees working underground, it was unlikely that simultaneous first aid would be required at different mines – The Board found that while the mines remain out of production, Xstrata is in accord with the regulation by having the two first aid rooms in the charge of the same qualified first aid attendant – Appeal allowed; Order rescinded

XSTRATA CANADA CORPORATION; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), LOCAL 2020; RE RICK KULYSKI, INSPECTOR; AND CANADIAN AUTOWORKERS (CAW) CANADA AND ITS LOCAL 598 199

Health and Safety – Employee – Employer – These applications concern the health and safety of paramedics (employees of Essex represented by CUPE) in relation to communications systems which the MOHLTC has the sole and exclusive responsibility to provide and operate – There were six issues over which Essex and CUPE disagreed with the MOHLTC: the need for a second portable radio on an ambulance crew so that both crew members would have a portable radio; testing emergency buttons on the radios; preventative maintenance of the radios; flagging of potentially dangerous addresses; mike to mike functions on cell phones; and information on defects in the system – The Board reviewed the factual context, the hazards faced by paramedics, and the MOHLTC's role with respect to the provision of ambulance services in Essex – The Board found that while MOHLTC was not the employer of the paramedics, it did have some of the obligations of an employer under the OHSA to the paramedics – The Board found a high level of integration between the communications and dispatch functions performed by the MOHLTC and the service functions performed by Essex – The Board noted that the paramedics were under the constant direction and control of [MOHLTC's] Central Ambulance Communication Centre from the beginning to the end of their shifts – After an extensive review of the case law, the Board found the integration of these systems was sufficient to impose upon the MOHLTC some of the obligations of an employer in relation to the paramedics–given that the contiguous sphere of operations with Essex meant that MOHLTC's activities could pose a risk of harm to the paramedics – Alternatively the Board found the MOHLTC, although a non-natural person, could be a supervisor under the Act, and given the authority (complete and exclusive control over the communications system it requires the paramedics to use) it exercised over the paramedics, it was their supervisor – The Board went on to find that the MOHLTC did breach certain obligations with respect to the six issues as an employer (and alternatively as a supervisor) in relation to the paramedics with respect to the communications systems – Declarations, orders and directions made

MINISTRY OF HEALTH AND LONG-TERM CARE, LAND AMBULANCE PROGRAMS; RE CUPE LOCAL 2974.1 AND R. TAGGART, INSPECTOR; RE COUNTY OF ESSEX-WINDSOR 108

Health and Safety – Interim Relief – The College and two of its unions were unable to come to agreement on the timely and appropriate statutory inspections of the workplace, which occupies approximately 100 acres of land and consists of almost 1,900 rooms or spaces – The Inspector ordered that the physical condition of the workplace be inspected once a month – The College appealed and sought a suspension of the order, asserting that the parties enjoyed a long history of regular and compliant inspections until the end of the last agreement – The Board held that a suspension of the order would not relieve the College of its obligations under the Act; there was no evidence to suggest that a suspension of the order would put employees at risk; a failure to suspend the order would considerably prejudice the employer; and the employer had pleaded a strong *prima facie* case for success on the merits of the appeal – However, the Board concluded although it could suspend the order under appeal, it had no jurisdiction to substitute a second order in the context of a suspension request - After consulting with the parties, the Board issued an interim order directing the parties to conduct inspections in accordance with a proposal proffered by the College – Suspension granted, appeal to be heard

FANSHAWE COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE OPSEU, LOCAL 109, OPSEU, LOCAL 110 AND CHRISTOPHER CALAGHAN, INSPECTOR. 35

Health and Safety – The employer challenged the propriety of an order requiring it to ensure that workers are protected from falling during the offloading of flatbed trailers – The Inspector issued the order under a section of the Regulation that deals with material handling rather than fall protection – The Board found that the risk identified by the Inspector had nothing to do with *what* the workers were doing, and had everything to do with *where* they were doing it – The elevation of the workers securing the loads on the flatbed trailers (approx 1.5 metres) did not meet the minimum to be captured by the fall protection provisions (3 metres) – The Board held that the Inspector's order imposed a more stringent standard on the Employer than the actual standard in the regulation designed to address the specific hazard – Appeal allowed; order rescinded

NATIONAL STEEL CAR; RE UNITED STEEL WORKERS OF AMERICA, LOCAL 7135 AND JOHN PIERROZ, INSPECTOR 165

Interference in Trade Unions – Certification Where Act Contravened – Construction Industry – Intimidation and Coercion – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 1

Interference with Trade Union – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD 92

Interim Relief – Health and Safety – The College and two of its unions were unable to come to agreement on the timely and appropriate statutory inspections of the workplace, which occupies approximately 100 acres of land and consists of almost 1,900 rooms or spaces – The Inspector ordered that the physical condition of the workplace be inspected once a month – The College appealed and sought a suspension of the order, asserting that the parties enjoyed a long history of regular and compliant inspections until the end of the last agreement – The Board held that a suspension of the order would not relieve the College of its obligations under the Act; there was no evidence to suggest that a suspension of the order would put employees at risk; a failure to suspend the order would considerably prejudice the employer; and the employer had pleaded a strong *prima facie* case for success on the merits of the appeal – However, the Board concluded although it could suspend the order under appeal, it had no jurisdiction to substitute a second order in the context of a suspension request - After consulting with the parties, the Board issued an interim order directing the parties to conduct inspections in accordance with a proposal proffered by the College – Suspension granted, appeal to be heard

FANSHAWE COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE OPSEU, LOCAL 109, OPSEU, LOCAL 110 AND CHRISTOPHER CALAGHAN, INSPECTOR. 35

Interim Relief – Construction Industry – Intervenor – Unfair Labour Practice – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC 173

Interim Relief – Construction Industry – Unfair Labour Practice – During the course of a LIUNA investigation into the operations and affairs of Local 183, the Local complained that LIUNA was interfering with Local 183's ability to perform its duties – The complaint alleged that the investigator refused to disclose reasons for the investigation, the source of the information that instigated the investigation, or when the investigation would be completed – Local 183 said the investigator was intrusive and interfering with its autonomy by requesting huge volumes of original documents including material that encroached on its executives' personal lives and by ordering Local 183 to reinstate employees who they say were laid off for good reasons – The Board found that it has jurisdiction to make interim orders concerning procedural matters only and it must be satisfied that the order(s) requested are necessary to preserve the processes of the Board until the hearing in the Main Application is concluded – Local 183 was seeking to restrain LIUNA's activities without the necessary connection between these activities and the need to protect the Board's process interests being present – Unlike Local 183's 2004 application which the Board distinguished, this investigation was not initiated following filing of an application; it had been ongoing at the time the Main Application was filed – The investigation was not commenced in a way that was an attempt to or would have the effect of interfering with the Board's processes – The Board was not satisfied that the investigation would have any significant impact on Local 183's ability to carry out its statutory obligation to bargain – Application dismissed

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C., AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD 85

Intervenor – Jurisdictional Dispute – The Millwrights brought two applications in response to grievances filed by the Plumbers – EPSCA intervened in both applications, which relate to the same work in dispute performed at the same worksite – During mark-up meetings required by the collective agreement, to which all parties were bound, the work in dispute was assigned to the Millwrights; however, the work was done by the Plumbers – Both employers state that they did not change the work assignment and when they became aware that the Plumbers had done the work they directed that the work be performed by the Millwrights – The Plumbers argued that the work was finally assigned to them and that the Millwrights had the onus of demonstrating that the work assigned to the Plumbers should be altered – The Board stated that it would not support efforts by parties to gain advantage by avoiding or ignoring the transparent processes contained in the EPSCA collective agreements – The Board held that the fact that the union to whom the work was not assigned did the work does not mean that there was a change made to the assignment – The Plumbers' challenge to the assignment of work in dispute came almost a year after they were aware of the assignment – As a result, the Board found it was not necessary to inquire further into the assignments of work – The Board exercised its discretion and was not prepared to consider the Plumbers' claim to the work in dispute – The assignments were not challenged in a timely manner – Board declares the work in dispute was properly assigned to the Millwrights

AKER KVAERNER SONGER CANADA, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 67 AND; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1007; RE; EPSCA 30

Intervenor –Construction Industry – Interim Relief – Unfair Labour Practice – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC 173

Intimidation and Coercion – Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 1

Judicial Review – Bargaining unit – Certification – Employee – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

RAINBOW CONCRETE INSDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND ONTARIO LABOUR RELATIONS BOARD 218

Jurisdictional Dispute – Intervenor – The Millwrights brought two applications in response to grievances filed by the Plumbers – EPSCA intervened in both applications, which relate to the same work in dispute performed at the same worksite – During mark-up meetings required by the collective agreement, to which all parties were bound, the work in dispute was assigned to the Millwrights; however, the work was done by the Plumbers – Both employers state that they did not change the work assignment and when they became aware that the Plumbers had done the work they directed that the work be performed by the Millwrights – The Plumbers argued that the work was finally assigned to them and that the Millwrights had the onus of demonstrating that the work assigned to the Plumbers should be altered – The Board stated that it would not support efforts by parties to gain advantage by avoiding or ignoring the transparent processes contained in the EPSCA collective agreements – The Board held that the fact that the union to whom the work was not assigned did the work does not mean that there was a change made to the assignment – The Plumbers' challenge to the assignment of work in dispute came almost a year after they were aware of the assignment – As a result, the Board found it was not necessary to inquire further into the assignments of work – The Board exercised its discretion and was not prepared to consider the Plumbers' claim to the work in dispute – The assignments were not challenged in a timely manner – Board declares the work in dispute was properly assigned to the Millwrights

AKER KVAERNER SONGER CANADA, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 67 AND; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1007; RE; EPSCA 30

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The

Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD 92

Practice and Procedure – Construction Industry – First Contract Arbitration – Reconsideration – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 20

Reconsideration – Construction Industry – First Contract Arbitration – Practice and Procedure – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 20

Remedies – Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Intimidation and Coercion – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 1

Status – Bargaining Unit – Certification – This application raised two issues: whether the Union's proposed bargaining unit improperly excluded five yard dispatchers; and whether S and B were employees at the time of the vote – The Board noted that the Union's proposed bargaining unit need not be the best possible, but its configuration should be viable without causing serious labour relations problems – There were several considerations: the dispatchers would be the only full-time employees in the distribution centre not represented; they had little prospect of attracting a trade union; there would be fewer work opportunities for bargaining unit members because many of the dispatchers were sourced from bargaining unit positions; it was a condition of employment that bargaining unit employees cover the dispatcher positions; and a dispatcher position was a logical placement for employees with physical restrictions and/or who were in need of accommodation due to disability – The Board held that the Union's proposed exclusion of the yard dispatchers created undue fragmentation – As for the two remaining disputed

employees, the Board determined that S, on maternity leave of finite duration with a statutorily protected right to return to her position, was an employee at the time of the vote, but B, away from the workplace, earning no wages, for almost twenty months, was not – B's continued group benefit coverage and employee discount were not evidence of a substantial connection to the workplace – Ballots to be counted in accordance with Board decision

HUDSON'S BAY COMPANY; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA)... 63

Termination – Construction Industry – First Contract Arbitration – Practice and Procedure – Reconsideration –Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 20

Timeliness – Certification – Construction Industry – Because of a defective initial delivery (by fax) of one of two applications for certification, and the subsequent delivery of the application by courier, the employer asserted that the application was untimely – The Board (differently constituted) ruled on the delivery some three weeks after it was actually made – The present panel held that the employer was required to file its response and Schedule A within two days of the delivery of the application – The Board rejected the employer's position that the application for certification was not "valid" until the Board exercised its discretion to extend the time for delivery; once filed with the Board, the application was always valid – The employer's failure to provide a timely response prejudiced the applicant's ability to ascertain where employees were working on the application date – One certificate issued; second matter continues

JAY-DEE CONCRETE FORMING, VANSMIT LTD. O/A; RE LABOURERS' INTERNATONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL 71

Timeliness – Construction Industry – First Contract Arbitration – Practice and Procedure – Reconsideration – Termination – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that

Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 20

Unfair Labour Practice – Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Intimidation and Coercion – Remedies – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 1

Unfair Labour Practice – Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Practice and Procedure – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD 92

Unfair Labour Practice – Construction Industry – Interim Relief – During the course of a LIUNA investigation into the operations and affairs of Local 183, the Local complained that LIUNA was interfering with Local 183's ability to perform its duties – The complaint alleged that the investigator refused to disclose reasons for the investigation, the source of the information that instigated the investigation, or when the investigation would be completed – Local 183 said the investigator was intrusive and interfering with its autonomy by requesting huge volumes of original documents including material that encroached on its executives' personal lives and by ordering Local 183 to reinstate employees who they say were laid off for good reasons – The Board found that it has jurisdiction to make interim orders concerning procedural matters only and it must be satisfied that the order(s) requested are necessary to preserve the processes of the Board until the hearing in the Main Application is concluded – Local 183 was seeking to restrain LIUNA's activities without the necessary connection between these activities and the need to protect the Board's process interests being present – Unlike Local 183's 2004 application which the Board distinguished, this investigation was not initiated following filing of an application; it had been ongoing at the time the Main Application was filed – The investigation was not commenced in a way that was an attempt to or would have the effect of interfering with the Board's processes – The Board was not satisfied that the investigation would have any significant impact on Local 183's ability to carry out its statutory obligation to bargain – Application dismissed

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C., AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD 85

Unfair Labour Practice – Construction Industry – Interim Relief – Intervenor – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC 173

1514-06-U; 1516-06-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **450477 Ontario Ltd. Chartrand Equipment**, Responding Party

Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Intimidation and Coercion – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

BEFORE: *Jack J. Slaughter*, Vice-Chair.

APPEARANCES: *Lorne Richmond, Eli Gedalof, Mike Ryan* and *Ian Copps* appearing for the applicant; *Michael Ruddy, Guy Chartrand* and *Yvon Chartrand* appearing for the responding party.

DECISION OF THE BOARD; February 17, 2010

1. Board File No. 1516-06-R is a certification application filed on August 14, 2006 by Labourers International Union of North America, Ontario Provincial District Council ("the OPDC" or the "Union") with respect to 450477 Ontario Ltd. Chartrand Equipment ("the Employer" or "Chartrand") pursuant to section 128.1 of the *Labour Relations Act, 1995* S.O. 1995 c.1 as amended (the "Act").

2. Board File No. 1514-06-U is an unfair labour practice complaint filed by the OPDC against the Employer alleging that the Employer has violated sections 70, 72 and 76 of the Act in the course of the OPDC's organizing campaign against the Employer.

3. On January 3, 2007, the parties reached Interim Minutes of Settlement in these matters. Pursuant to the terms of the Minutes of Settlement, the certification application was converted to an application under section 8 of the Act, wherein the OPDC is seeking remedial certification under section 11 thereof. The OPDC conceded that it had filed membership evidence on behalf of less than 40% of the individuals in the bargaining unit. The parties agreed that 32 persons were employed in the bargaining unit on the date of application. The parties left open the question of whether a further 8 employees should be included in the bargaining unit, or should be excluded therefrom as managerial personnel within the meaning of section 1(3)(b) of the Act. Finally, it was agreed that one panel of the Board would hear and determine both files.

4. This panel then heard from a total of 13 witnesses over a two year period. At the final argument stage, the parties resolved issues pertaining to the bargaining unit description and the managerial challenges. Therefore, pursuant to the agreement of the parties the Board finds that Pete Coulombe, Tim Patterson, Gilles Boileau, Denis Corbeil, Dwayne Sutherland, Denis Cote, Jason Suski and Real Giguere are also included in the bargaining unit, bringing the final list of employees to a total of 40. The Union also agreed that the aspect of its unfair labour practice complaint pertaining to Yvon Gauthier should be dismissed as there was no evidence in the record to substantiate the OPDC's allegation in respect of the Employer's alleged misconduct with respect to Mr. Gauthier.

THE ISSUES TO BE DETERMINED

5. The issues to be determined may be simply stated:

> (a) Did the Employer commit unfair labour practices in violation of sections 70, 72 and 76 of the Act?
>
> (b) If the Employer has violated the Act, is the OPDC entitled to remedial certification under section 11 of the Act?
>
> (c) If the Employer has violated the Act, should any other relief be granted to the OPDC?

FACTUAL OVERVIEW

6. The Board heard oral testimony from 13 witnesses, 6 called by Chartrand and 7 called by the Union. Giving evidence on behalf of the Employer were: its owner and superintendent, Guy Chartrand; its owner and Manager, Yvon Chartrand; and its working foremen Tim Patterson, Dwayne Sutherland, Gilles Boileau and Jason Suski. Giving evidence on behalf of the Union were its Director

of Organizing for Central and Eastern Canada, Gerry Varricchio; and its organizers Kyle Brisson, Carlo Di Blasio, Todd Dumbrell, Matt St. James, Sandro Corsi, and Ian Copps.

7. Although some other matters were canvassed with the witnesses, the vast majority of the evidence was directed to four essential factual questions:

> (a) What was Chartrand's knowledge of, and approach to, union organizing prior to August 14, 2006, the date of application?
>
> (b) What was Chartrand's knowledge of, and approach to, the Union's organizing campaign on the morning and afternoon of August 14, 2006, prior to the vehicular pursuit of the Union's organizing team of Messrs. Copps and Corsi through the streets of Timmins by Chartrand's working foremen (the "Chase")?
>
> (c) What happened on the Chase?
>
> (d) What happened on the evening of August 14, 2006 at the Union meeting at the Cedar Meadows Resort, including events occurring prior to and after the filing of the application?

(a) Employer knowledge of and approach to union organizing prior to the date of application.

8. Chartrand is a family owned and operated construction company. It performs road building, sewer and watermain and heavy engineering construction work in northeastern Ontario from its headquarters in Timmins, Ontario. The founders of the Employer are the husband and wife team of Maurice and Colette Chartrand. They are still involved in the business, although their two sons, Guy and Yvon, are now in charge of the day-to-day activities. The job responsibilities are allocated as follows: Colette does bookkeeping and the Employer's accounts; Maurice is in charge of the shop; Yvon is responsible for human resources; information technology, daily purchasing and health and safety; Guy bids and estimates projects and oversees all the work in the field.

9. In the summer of 2006, a few months prior to the Union's application for certification, the Employer became aware of an organizing drive of its employees being conducted by International Union of Operating Engineers, Local 793 (the "Operating Engineers"). The Operating Engineers' organizers waited outside the Employer's job sites and shop and handed out flyers to employees leaving work. They identified themselves by handing out business cards.

10. Yvon and Guy Chartrand did not like this organizing drive. They did not want a trade union representing their employees. Yvon Chartrand got information from a web site about how to challenge information provided to employees by trade unions. Then he consulted a lawyer from Sudbury, Brian Gatien, who drafted a letter to be given to the Employer's employees in an effort to thwart the Operating Engineers' organizing drive. Yvon Chartrand handed out this letter to the Employer's working foremen at a morning meeting in June 2006, and explained what it meant. He made it clear that the Employer expected the working foremen to be management's "eyes and ears" and to speak to employees about the letter. Although Yvon Chartrand testified that the letter was only designed to "provide the employees with information", its contents clearly convey the message that the Employer does not want a trade union. All of the working foremen who testified were aware of

the letter and its purpose. In particular, Gilles Boileau and Jason Suski viewed part of their jobs as keeping unions out of Chartrand.

11. The Operating Engineers' organizing drive fizzled out in June or early July 2006. However, the Union's organizing drive started shortly thereafter. The Union started analyzing the Employer's operations and signing membership applications in July 2006. However, there is no direct evidence the Employer's management was aware of the Union's organizing drive prior to the date of application.

(b) Employer knowledge of the Union's organizing campaign during the morning and early afternoon of August 14, 2006.

12. The Union held a morning breakfast meeting and strategy session at the Cedar Meadows Resort ("CM") on Monday, August 14, 2006. The meeting ended around 8:00 a.m., after which various organizing teams headed out on the road. The Union was conducting an organizing "blitz", with the Employer as one of its primary targets. Gerry Varricchio, the Union's Director of Organizing, remained at the CM, which served as the "base camp" for the blitz. Kyle Brisson went to check out Kirkland Lake, where the Employer had recently completed a job. In the Timmins area, there were at least 3 other organizing teams: Carlo Di Blasio and Oddie (no surname was provided in the evidence); Todd Dumbrell, Adrian Tessier and Matt St. James travelling together in a burgundy rental truck; and Ian Copps and Sandro Corsi riding together in a silver Ford F150 pick-up truck.

13. The first contact between Union organizers and Chartrand employees that morning occurred around 9:30 a.m. at a highway job near the Town of Matheson. The Board heard conflicting evidence about this encounter from Messrs. St. James, Dumbrell and Patterson. The evidence of Mr. Patterson was that he received a call on his radio from another of the Employer's working foremen, Paul Hamel, that someone was harassing a flagger and had left her in tears. Mr. Patterson had posted four flaggers on the highway. The job had 2 zones, and one flagger was placed at each end of each zone. According to Mr. Patterson, he arrived to find a "stranger" holding a flag; a flagger in tears; and flyers "promising jobs at $30.00 an hour". The "stranger" refused to identify himself, but drove off throwing flyers out the window after Mr. Patterson said he would be calling the police.

14. Messrs. St. James and Dumbrell tell quite a different story. According to them, Mr. Patterson was a friend of Mr. St. James and recognized him right away. At the time Mr. Patterson recognized Mr. St. James, a flagger was signing a card on Mr. Tessier's back, and Mr. Tessier was holding the flag for her. Mr. Patterson uttered words along the lines of "what are you doing here? You'll get me in trouble" to Mr. St. James, who assured Mr. Patterson the Union organizers would leave quickly. Around that time another working foreman, Pete Coulombe, drove up in a Ford F250 pick-up truck and gave them "a cold stare", after which the Union organizers quickly departed.

15. The Board has no hesitation in accepting the evidence of Messrs. St. James and Dumbrell over that of Mr. Patterson with respect to this incident. After carefully referring to a "stranger" in his direct evidence, Mr. Patterson spontaneously referred to Mr. St. James as "Matt" during his cross-examination. Later in the day, Guy Chartrand readily recognized Mr. St. James as well. The documentary evidence before the Board also supports the Union's contention it obtained support from the flaggers. Furthermore, the evidence of Messrs. Patterson, Suski and Yvon Chartrand consistently reveals that they view the actions of union representatives in approaching employees to sign

membership documents as "harassment". It appears to the Board Mr. Patterson was indeed a friend of Mr. St. James, but in order to distance himself from any suggestions he was a union symphathizer that might be made by Messrs. Hamel and Coulombe he fabricated allegations of harassment by "corporate recruiters" and telephoned the police with this information.

16. Mr. Patterson undoubtedly knew that a union organizing drive of the Employer was underway. It is true that the Union did utilize and distribute flyers that made no reference to the Union, and contained language which could be construed as coming from a large pipeline or oil patch employer. However, the flyer contains no mention of "$30.00 an hour". Mr. Patterson understood exactly who Mr. St. James was and what he was doing.

17. So, did Mr. Patterson communicate this information to anyone else? Mr. Patterson and all the management witnesses who testified except Gilles Boileau deny that he did. Mr. Boileau, in cross-examination, admitted Mr. Patterson said it "could be" the Union. The Board does not believe the other management witnesses. The Employer had been through an organizing campaign by the Operating Engineers a few scant months earlier. Yvon and Guy Chartrand had put the working foremen on notice what to look out for, including the use of flyers. The Chartrand brothers counted on the working foremen to be their "eyes and ears" to report back on and counter union organizing tactics. "Harassment" was a code word for union organizing to the management team and working foremen at the Employer. The Board finds that Mr. Patterson reported the union organizing efforts to at least Guy and Yvon Chartrand, Jason Suski and Dwayne Sutherland. Mr. Patterson spoke to Guy Chartrand at 10:45 a.m., had the Ontario Provincial Police at Matheson by 11:45 a.m., and Yvon Chartrand on site by 1:45 p.m. Yvon spoke to one of the flaggers about the alleged "harassment". She did not identify the Union activity to him, which is entirely believable and understandable given the Employer's well-known anti-union attitude.

18. Much more was going on that morning. While Mr. Patterson and Guy Chartrand were trying to get the police to come out to Matheson to deal with the alleged harassment of employees, the St. James, Corsi and Di Blasio organizing teams were visiting job sites and getting membership applications signed. The Di Blasio team went to the Monteith and Home Depot job sites but was able to avoid controversy. This was not the case for the St. James and Corsi organizing teams, which engaged in a running series of encounters with the Employer's working foremen.

19. The Board heard a great deal of conflicting evidence about these encounters, and the alleged participation of Guy and Yvon Chartrand in some of them. There were inconsistencies internally in each side's evidence, as well as inconsistencies between Union and Employer witnesses. The difficulty for the Employer is that all of the evidence of its witnesses must be viewed in the light of the patently unbelievable evidence of Mr. Patterson that he did not know about the Union's organizing drive and did not communicate it to anyone. That does not mean that the Employer's witnesses are not to be believed on all points or that the Union's witnesses are entirely credible, but it does colour the Board's review of the evidence that follows. Such review will be limited to the relevant events, and will not try and capture all of the lengthy testimony heard by the Board.

20. Mr. Patterson chased the St. James and Corsi vehicles across the Matheson site and observed the organizing teams taking pictures of the job site. He also telephoned Jason Suski and Dwayne Sutherland to tell them about the "harassment", as well as Guy and Yvon Chartrand. He did meet with a female OPP officer at the local MTO Office to discuss the harassment. No police report

was filed. No harassment charges were laid. There is nothing before the Board to indicate the police did anything more than listen to Mr. Patterson's allegations of harassment, which in the Board's view were both contrived and self-serving.

21. It is worthwhile to note that while Mr. Patterson did not say he spoke to Gilles Boileau, Mr. Boileau testified he got a call that morning from Mr. Patterson about "recruiters" who were telling people they were from the Ministry of Labour and offering a "lot of money". Mr. Suski's evidence was that Mr. Patterson told him there was harassment of flaggers by people who said they were from the Ministry of Labour to get them "to sign paperwork". Mr. Sutherland testified that he only heard about site visits recruiting for "great jobs". Quite frankly, all of their testimony comes across as a cover story, although a somewhat superficially plausible one, for what these working foremen knew from Mr. Patterson was a union organizing drive. At one point in his testimony, Mr. Boileau slipped and said Mr. Patterson told him "it could be the Union". Yes, he did, and yes, it was.

22. The Union did hand out flyers that on their face were somewhat misleading. Those flyers do not refer to the Union. They do talk about "hiring" for jobs with good wages and benefits. Both of these features are consistent with the "corporate recruiter" story. However, Mr. Varricchio explained that the flyers are kept generic, so that an employee found in possession of one by an employer can deny any involvement in Union organizing activity. He further explained that Union organizers are expected to identify themselves to bargaining unit employees and to get membership applications signed. All the Union organizers who testified said this is what they did. The Union's membership applications clearly identify what they are. The Board is satisfied that the Union organizers did identify themselves and did not mislead employees as to who they were. That is not to say that they were forthcoming and co-operative with the Employer's management or working foremen at all times, but they are not required to be.

23. The next noteworthy encounter comes at the Princess Street site. At this site, Messrs. Copps and Corsi were speaking to two employees sitting in a pick-up truck watching a small television on their noon break. Mr. Suski then pulled up in his black pick-up truck with two other employees. They were just returning from a Subway sandwich shop. All of Messrs. Copps, Corsi and Suski testified about what transpired then, and most of their testimony is consistent. The driver of the pick-up (identified by Mr. Suski as his long-term trusted employee Don Boucher) said "it's the Union" after Mr. Suski asked "what's going on". Mr. Copps told Mr. Suski about a planned meeting at the CM that night where upcoming work would be discussed and invited him to come. Mr. Suski said "no one here is interested", following which Messrs. Copps and Corsi drove away. The testimony of the three witnesses is consistent with these points. Mr. Suski asserts that Mr. Copps said he was not from the Union, but that is not believable. The Board finds he had already heard from Mr. Patterson about the Union organizing drive, which was now confirmed to him by a long-term trusted employee. Mr. Suski telling the union organizers "no one is interested" is further consistent with Yvon Chartrand's June 2006 message about how the Employer felt about trade unions. The bottom line on this encounter is that Mr. Suski confronted the Union organizers and they left the site.

24. There is evidence from four witnesses that Guy and Yvon Chartrand arrived at the Princess Street site just as Messrs. Copps and Corsi were leaving. In final argument, counsel for the Employer objected that the testimony of Messrs. Dumbrell and Vaillancourt about this arrival was not put to the Chartrand brothers during their cross-examination, contrary to the rule in *Browne* v. *Dunn*, (1893) 6 R.67 (H.L.) although no objection was made at the time of their testimony. Very little turns on this, as the testimony of the four witnesses is largely consistent. Guy Chartrand recognized Matt

Vaillancourt, and Matt recognized Guy. Mr. Dumbrell was observed talking to a worker by Guy. This is consistent with evidence of Union organizing activity, and the Board has found the Chartrands were previously made aware of the Union organizing by Mr. Patterson. Regardless of certain details of Mr. Dumbrell's testimony, the denials of knowledge of Union activity by Guy and Yvon Chartrand around this incident are not credible. The Board does not believe Don Boucher would tell Guy Chartrand that Messrs. Copps and Corsi were "looking for guys for the pipeline" as Guy asserted in cross-examination, when he had bluntly told Mr. Suski they were from the Union. Guy Chartrand did know the workers had been invited to a "show and tell". Similarly, Yvon Chartrand's assertion that he asked Mr. Suski if it was a Union drive, only to be told it was a recruiting campaign for big pipeline and hydro jobs is not credible, nor is his assertion the Union flyer promised "$30.00 per hour". As previously noted, that information appears nowhere on that document. However, this incident further demonstrates that the Employer was aware of Union organizing activity. Even if the Chartrand brothers told Mr. Dumbrell to leave the site (an event about which he testified but which was never put to Guy and Yvon), this is not an unfair labour practice but a simple assertion of employer authority over its workplace, which Mr. Dumbrell was in no hurry to obey as the job was on public property.

(c) What happened on the Chase?

25. The next incident is the Chase. The Board heard direct evidence about what happened on the Chase from Messrs. Suski and Boileau on behalf of the Employer and Messrs. Copps and Corsi on behalf of the Union. Guy Chartrand's role in the Chase is disputed, but he did testify about it. Other witnesses related telephone conversations pertaining to what they learned of the Chase later on in the day. Dennis Corbeil, a major participant in the Chase, did not testify. Except for the role of Guy Chartrand, most of the evidence is again largely consistent. The Board will not delve into the intricacies of all the testimony, but will focus on the important aspects of the Chase, and the points necessary to determine issues of credibility.

26. The Chase began when Messrs. Copps and Corsi returned to the Princess Street site in the early afternoon to take pictures. Both Messrs. Corsi and Suski agreed this was the third time this organizing team had visited the site that day. Mr. Corsi was taking pictures. Mr. Suski came towards them in his vehicle. The Copps vehicle tried to drive away. Mr. Suski attempted to block their escape, but Mr. Copps eluded him. Then Mr. Suski turned after him and followed. The Chase was on.

27. The testimony of Messrs. Corsi, Boileau and Suski is that three Employer vehicles were involved in the Chase while Mr. Copps could identify only two. As Mr. Copps was confronted with one Employer vehicle chasing him and another pulling in front of him to cut him off on a mad dash on the highway leading into Timmins, and was on his cell phone calling for help, one can excuse him for not having time to look around and carefully note what was happening. The Board finds three vehicles were attempting to surround the Copps vehicle – one ahead and two behind.

28. There is no dispute both Jason Suski and Dennis Corbeil were involved in the Chase. There is a dispute about the participation of Gilles Boileau and Guy Chartrand. Both Messrs. Suski and Boileau stated that Messrs. Suski and Corbeil were chasing the Copps vehicle with Mr. Suski immediately behind and Mr. Corbeil in the trail position, and that Mr. Boileau pulled out in front after waiting at a designated spot. Mr. Boileau was driving a black Ford F250 Super Duty 4 door pick-up

truck, while Mr. Corbeil was driving a black Ford F350 Super Duty 4 door pick-up truck. The Board believes this evidence. Although Messrs. Corsi and Copps believed Mr. Corbeil was driving the lead vehicle, they both said it was an F250 and not an F350. Given the large tool boxes in the truck boxes and the other circumstances of the Chase, the Board cannot accept that Mr. Copps could clearly see the driver of the lead vehicle during the Chase. Mr. Boileau's testimony about driving the lead vehicle and other details of the Chase is credible and consistent with actually participating in the Chase.

29. The four vehicles continued west off the highway and into the streets of downtown Timmins. The Copps vehicle was trying to disengage by turning left, but the Employer's working foremen would have none of that. They eventually trapped the Copps vehicle with one Chartrand vehicle parked in front and one behind. Both Messrs. Copps and Corsi were understandably terrified.

30. There is a serious issue as to what happened next. Both Messrs. Copps and Corsi testified that a black Ford F150 pick up truck pulled up across from their vehicle. They say the driver was Guy Chartrand. The driver wore a yellow shirt, sunglasses and was using a cell phone. Messrs. Copps and Corsi claim that the driver nodded to the working foremen and drove off before the mayhem occurred. This is denied by the Employer witnesses.

31. After a careful review of the evidence, the Board does not find the Union has proved its allegation of Guy Chartrand's involvement. Both Messrs. Copps and Corsi admitted they had only a matter of seconds to make their observations. They did not identify Guy Chartrand as the driver of the F150 at all on the date of application, but only did so later. Mr. Boileau, driving an F250, testified he did pull up to the Copps vehicle in the manner alleged by Messrs. Copps and Corsi, before quickly parking behind the other three vehicles. Guy Chartrand gave detailed testimony that placed him elsewhere at the relevant time, which testimony included the name of the city Inspector with whom he had dealings about a gas line relocation at the Tamarack project. The Board believes Guy Chartrand on this point, and finds he was not on the scene of the conclusion of the Chase. The Board finds Gilles Boileau was the driver of the third Chartrand truck involved in the Chase.

32. What happened next is not disputed. Mr. Suski walked up to the Copps vehicle and yelled "What the fuck are you doing? What's with the pictures? Why do you keep coming back to the sites?" It is significant to note that Mr. Suski never asked Messrs. Copps and Corsi who they were. Despite his denials, he knew very well that Messrs. Copps and Corsi were Union organizers. Mr. Corbeil then approached the Copps vehicle. He asked Mr. Copps if it was his truck or a "company truck". Mr. Copps said it was a personal vehicle. Mr. Corbeil returned to his truck and came back with a 2 x 4 piece of lumber. Mr. Suski stepped back and said "Here we go". Mr. Corbeil then said "if I catch you on my sites again, I'll fucking kill you". Mr. Corbeil took three savage swings and broke the driver side rear view mirror. He finished with "Stay the fuck away from our men". Then the three Employer vehicles left. The Copps vehicle drove to safety at the nearby Days Inn where it was met by Mr. Varricchio and other Union officials. The final incident on the Chase took place in a matter of minutes.

33. The Employer vehicles then drove to the Tamarack site. The drivers met with Guy Chartrand. They told him what had happened. Mr. Boileau told him he might get a telephone call from the police. Although Guy was not pleased, he did not tell them what they did was wrong or why it was wrong. He simply told them to "get the fuck back to work".

34. After learning of the Chase, Mr. Varricchio called the organizing teams in from the field. This occurred between 3:00 and 4:00 p.m. He wanted to conduct a de-briefing of the day's activities, and to prepare for the organizing meeting set for 7:30 p.m. at the CM.

35. Meanwhile, work continued on the Employer's various job sites. Guy and Yvon met and discussed the Chase at the Home Depot site between 4:00 and 5:00 p.m., after which Guy went to his office. Both Guy and Yvon testified that they had no involvement with arranging for a group of working foremen to attend at the CM that evening.

36. Mr. Varricchio got in touch with the police, who interviewed Messrs. Copps and Corsi at the CM between 4:00 and 5:00 p.m. The Union de-briefing started around 5:00 p.m. in a room on the second floor of the CM. Mr. Varricchio was gathering information, making arrangements for the organizing meeting, and preparing the application for certification.

(d) What happened on the evening of August 14, 2006 at the CM?

37. At some point in time, a convoy of Employer trucks, all driven by working foremen of the Employer, arrived in the parking lot of the CM. The Employer's witnesses provided no credible explanation of how this came to pass. Both Guy and Yvon Chartrand deny any involvement. Mr. Suski's story that he did not know how "the meeting came to be", and that Mr. Sutherland showed up at the last minute when Mr. Suski was turning in to the CM, are belied by Mr. Sutherland's testimony that there was a "buzz going around" that resulted in working foremen Suski, Sutherland, Corbeil, Rheal Giguere and Rob Bielek meeting at Mr. Suski's residence, and Mr. Patterson's testimony that he called Guy Chartrand from a remote site in Matheson to tell Guy that he was not going "to the job fair" because he was "too tired" although "Suski told me they were going". All of the working foremen drove their company vehicles prominently displaying the Chartrand logo to the CM. The Board finds that at a minimum this activity was organized by Jason Suski with the knowledge of Guy Chartrand.

38. The parties join issue over when the convoy arrived at the CM. The Employer witnesses maintain the working foremen gathered at Mr. Suski's home after work around 7:00 p.m. and got to the CM around 7:30 p.m. The Union witnesses disagree. Kyle Brisson placed their arrival around 6:45 p.m. on the basis there were working foremen "milling around" the display table he had set up in the downstairs meeting room 30 to 45 minutes before the scheduled start of the 7:30 p.m. meeting. Mr. Copps said the vehicles began to arrive at 5:45 p.m. and he identified them to the police at 6:30 p.m. after Mr. Brisson called him to come downstairs. Guy Chartrand was not there at that time but did arrive later on. Mr. Corsi states that 7 or 8 Employer vehicles arrived at 6:15 p.m. Mr. Varricchio testified that he called the police once he was informed by organizers that the Employer trucks were arriving, which was "a good hour" before the scheduled meeting time. Lastly, Mr. Di Blasio took photographs of what happened in the parking lot at the CM. Those photos bear time stamps ranging from approximately 6:45 to 7:00 p.m. During cross-examination, Mr. Di Blasio firmly rejected the suggestion the time stamps on his photos were not accurate, maintaining they were right and that he "absolutely did not forget" to manually change the hour on his camera's timing device to adjust for Daylight Savings Time in the spring.

39. The Board finds that the testimony of Messrs. Varricchio and Di Blasio is most credible on this issue. There are police visible in several pictures, which is consistent with the testimony of

Messrs. Copps and Varricchio that police were called immediately on seeing the Employer trucks arrive. Mr. Di Blasio is an organizer with 7 years' experience who understands the importance of having accurate photos on the date of application in a certification application. As such, he would have accurately set the timer on his camera, with August 14 being well past the annual spring move to Daylight Savings Time. The Employer witnesses' story has the feeling of concoction, contains significant inconsistencies, and is not bolstered by the fact these same witnesses all marked down on their time cards that they stayed at work until 7:00 p.m. They were, however, all paid until 7:00 p.m. Likewise, the working foremen who participated in the Chase were paid for their time on the Chase.

40. The Board need not spend a great deal of time on the byplay between the Employer working foremen and Union organizers in the time prior to and around the start of the meeting. It appears that mutual taunting and insults were exchanged, but nothing escalated beyond that, perhaps because of the police being on the scene. What is significant is the effect of what happened that evening on the Employer's employees. The Board agrees with counsel for the Employer that some hearsay evidence given by Mr. Varricchio should be disregarded. However, there is direct uncontradicted evidence that is worthy of weight. Both Messrs. Copps and Varricchio testified that 2 employees who had previously signed membership cards for the Union arrived, saw the working foremen who had trooped into the first floor restaurant for a meal, and got nervous. Messrs. Copps and Varricchio whisked them up to Mr. Varricchio's room for the sake of safety. These employees had heard talk of the Copps' truck "being smashed" and they were scared. These fears were certainly reasonable given the violent conduct of Mr. Corbeil, the overwhelming presence of a convoy of Employer vehicles, and the involvement of the police. In all the circumstances, any reasonable employee would have avoided the Union meeting at the CM that night. In fact, no employee did attend the Union meeting.

41. After 7:30 p.m., Guy Chartrand and Gilles Boileau arrived separately and joined the group of working foremen in the bar. Guy paid for drinks and dinner for all of the working foremen, including Chase participants Suski, Corbeil and Boileau. No admonishment to them for their conduct in the Chase occurred.

42. Meanwhile, Mr. Varricchio made the decision to file the certification application. He concluded the violence, threats of violence and Employer "show of force" at the CM meant the Union would not be able to sign any more cards. The application for certification was filed by Canada Post Priority Courier just after 9:00 p.m.

43. After filing the application, Messrs. Varricchio, Copps, Corsi, Brisson and St. James went to the restaurant/bar area with Mike Ryan, Business Manager of the Labourers Union, Local 493. Mr. Suski recognized Mr. St. James as someone who had taken pictures at the Princess Street site earlier. Yvon Chartrand arrived and organized "double taxis" (one driver to drive the person home and a second driver to drive the truck home) for those Employer working foremen too inebriated to drive home legally. Yvon departed the CM by 10:00 p.m. Guy stayed and shared a drink with Messrs. Ryan and Varricchio. Mr. Suski tried to "mix it up" with Mr. Copps by inviting him to step outside, and with Mr. Corsi by grabbing his shirt and calling him a profane name, but these altercations were broken up by Messrs. Brisson and Varricchio who sent the two Union organizers to their rooms. Guy watched the altercations but did not attempt to intervene. Guy stayed at the CM with Messrs. Corbeil and Suski until they closed the bar after midnight and took a cab home.

44. There are a few events of note in the aftermath of the Chase. Messrs. Copps and Corsi met with the police and separately gave them statements about the Chase on August 15, 2006. Messrs. Copps and Corsi also began to suspect the involvement of Guy Chartrand in the Chase on that date, based in part on him wearing a yellow shirt at the CM in the evening. On August 16, 2006, the Union held a demonstration in downtown Timmins featuring a twelve foot high rat wearing a Chartrand sign. The demonstration received coverage in the Timmins Daily Press. The police charged Mr. Corbeil with a property damage crime in relation to the 2 x 4 swinging incident on the Chase, for which he was later convicted. The Employer, acting through Yvon Chartrand, dismissed Mr. Corbeil, and gave time-limited demotions and pay decreases to Messrs. Suski and Boileau for their roles in the Chase. The Employer never apologized to the Union for the Chase, and never issued any letters to employees or held any meetings with employees in regard to the Chase.

ARGUMENT

45. The OPDC asserts that the conduct of the Employer in this matter amounts to unfair labour practices which caused the OPDC to fail to attain the 40% membership threshold necessary to obtain a representation vote under the Act. Furthermore, the Labourers say that the Board must certify the OPDC pursuant to section 11 of the Act in this case because no other remedy would be sufficient to counter the effects of the Employer's contraventions. The OPDC referred the Board to the following authorities: *East Elgin Concrete Forming Limited*, [2007] OLRB Rep. July/August 741 (July 18, 2007); *1443760 Ontario Inc. operating as Swing Stage Equipment Rentals Ottawa*, [2007] OLRB Rep. May/June 485 (June 15, 2007); *Riverstone Masonry Inc.*, [2009] OLRB Rep. January/February 120 (January 26, 2009); *Milnet Mines Limited* (1953) 53 CLLC 1462 ¶17,063 (O.L.R.B.); *Baron Metal Industries Inc.*, [2001] OLRB Rep. May/June 553 (May 4, 2001); *Vansmit Ltd. o/a Jay-Dee Concrete Forming*, 2009 CanLII 45830 (ON L.R.B.) (August 20, 2009); *Taxi-Taxi*, [1999] OLRB Rep. September/October 897; *Cambridge Canadian Foods Inc.*, [1987] OLRB Rep. March 319; *Wal-Mart Canada Inc.*, [1997] OLRB Rep. January/February 141; *Sheraton Fallsview Hotel & Conference Centre*, [1995] OLRB Rep. December 1475.

46. The Employer states that it has not violated the Act. The Employer asserts that the Board is confronted with an isolated incident of misconduct by a few of its working foremen that should not be attributed to any wrongdoing on the part of the Employer. With respect to evidentiary issues, the Employer referred the Board to the following case law: *Re Girvin and Consumers Gas Co.*, [1974] 1 O.R. (2d) 421 (Div. Crt.); *McConvey*, [1985] OLRB Rep. September 1386; *East Side Mario's*, [1993] OLRB Rep. August 744; *Toronto Board of Education*, [1983] OLRB Rep. July 1229; *Underwater Gas Developers Limited*, [1967] OLRB Rep. September 555. With respect to the Union's entitlement to automatic certification, the Employer referred the Board to *Alderbrook Industries Limited*, [1981] OLRB Rep. October 1331; *Swing Stage supra; L & L Painting and Decorating Ltd.*, [2007] OLRB Rep. September/October 887 (October 15, 1007); *East Elgin supra*; *K. D. Clair Construction Ltd.*, [2008] OLRB Rep. January/February 60 (February 26, 2008); *Lecompte Electric Inc.*, [2008] OLRB Rep. March/April 234 (April 15, 2008). The Employer concedes, however, that automatic certification would be an appropriate remedy if the actions of the working foremen on the Chase are attributed to the Employer.

ANALYSIS AND DECISION

(a) Did the Employer violate sections 70, 72 and 76 of the Act?

47. Sections 70, 72 and 76 of the Act provide as follows:

> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.
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> ***
>
> **72.** No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
>
> (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
>
> (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
>
> ***
>
> **76.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

48. One of the purposes of the Act, set out at section 2 therein, is to "facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees". Employees are free to choose trade union representation. Employees are also free to choose not to be represented by a trade union. Sections 70, 72 and 76 work together to protect and preserve that freedom of choice.

49. Employers also have rights to express their views about unionization. Under Ontario law, an employer is permitted to "say negative things and express its opposition to a union or unionization": *West Elgin Construction Ltd.*, [2005] OLRB Rep. May/June 502 (June 1, 2005), at paragraph 16. However, that freedom is circumscribed by the important limitation in section 70 of the Act that an employer may not "use coercion, intimidation, threats, promises or undue influence".

50. In this case, there is no evidence before the Board that the Employer had any knowledge of the Union's organizing drive prior to the date of application. The Employer did have knowledge of a prior organizing drive by the Operating Engineers, and the role of that knowledge is discussed below. The Board has found that Guy Chartrand did not play an active role in the Chase. There is no evidence of direct threats to the job security of employees by the management of Chartrand. What the Board does have before it is extensive evidence of threats, violence and intimidatory conduct by working foremen who would fall in the bargaining unit. However, this heinous and disreputable conduct received the apparent acceptance of Guy and Yvon Chartrand on the date of application, both before and after the certification application was filed.

51. The first important evidentiary finding is that the Employer knew there was an onoing Union organizing drive on the date of application. Tim Patterson knew it when he saw Matt St. James involved in signing membership applications in the morning at Matheson. Jason Suski knew it when Don Boucher told him "the Union" was talking to him while he was sitting in his truck at noon at Princess Street. It is not logical or credible to believe that Messrs. Patterson and Suski did not communicate this knowledge to the Chartrand brothers. The Chartrand brothers and working foremen who testified conveniently chose to use the code word "harassment" and their alleged belief in a non-existent corporate recruiting drive to attempt to disguise their knowledge of the Union's organizing drive. It was clear, particularly from the testimony of Jason Suski and Yvon Chartrand, that the Employer views the act of unions asking employees to sign membership applications as being "harassment". It is not. It is significant that the Employer called no evidence from anyone other than its management and working foremen, and introduced no police report, to back up its claims of alleged employee harassment by the Union organizers. On the other hand, the membership evidence filed in this matter indicates that numerous employees, including the allegedly harassed flaggers, felt otherwise and supported the Union. Nor is the Employer's case strengthened by the admittedly disingenuous nature of the information contained on the Union's flyers. The Board accepts the Union's evidence that its organizers made their presence and purpose known on the sites. Mr. Patterson recognized Mr. St. James and what he was doing. Mr. Dumbrell asserted he had a right to talk to employees. Mr. Boucher told Mr. Suski who Mr. Copps was, and Mr. Copps invited Mr. Suski to the Union's organizing meeting. The Board finds that despite their evidence to the contrary, Messrs. Patterson and Suski informed Guy and Yvon Chartrand that a Union organizing campaign was in progress on the date of application.

52. Prior to the Chase, there is no evidence of wrongdoing by the Employer. Merely telling Union representatives to leave job sites, or expressing negative opinions about a trade union, does not, without more, establish violations of the Act. The Chase, however, changed this state of affairs dramatically.

53. Apart from the role played by Guy Chartrand, there was little disagreement about what occurred on the Chase. Both parties agreed that the evidence disclosed "totally inappropriate behaviour" on the part of Jason Suski and Denis Corbeil. In fact, their conduct went well beyond

being inappropriate. Jason Suski started it by pursuing the Copps vehicle as it left the Princess Street site. He then escalated things by calling Messrs. Corbeil and Boileau to join him in a dangerous pursuit of the Copps vehicle both on the highway leading into Timmins and in the streets of downtown Timmins. The Chartrand vehicles then boxed the Copps vehicle in. Mr. Suski made threatening and menacing gestures to Messrs. Copps and Corsi. Mr. Corbeil went further over the line by engaging in an act of physical violence by smashing Mr. Copps' rear view mirror and uttering death threats to Messrs. Copps and Corsi. His parting words of "stay the fuck away from our men" are significant.

54. Therefore, the Chase involved acts of physical violence and death threats against Union organizers. Threats and violence have long been considered, for very good reason, to be acts of intimidation and coercion that amount to violations of sections 70, 72 and 76 of the Act: *Mihet Mines supra; East Elgin supra* at paragraph 38. Here, however, the Employer submits these acts came within one "isolated incident" perpetrated by bargaining unit employees, which should not be considered an act of the Employer.

55. The Board cannot agree with this submission. The actions of the Chartrand brothers both before and after the Chase demonstrate that the actions of Messrs. Suski, Corbeil and Boileau while on the Chase were those of persons "acting on behalf of an employer".

56. More specifically, the meeting held with the working foremen in connection with the Operating Engineers organizing drive in June 2006 by Yvon Chartrand conveyed a crystal clear message to Jason Suski, Gilles Boileau and the other working foremen that they were to be the "eyes and ears" of management, and to work to keep unions out of the Employer. In sending this message to the working foremen, who in turn passed it on to the rank and file employees, the Employer engaged them in a "special relationship" which meant that they would be perceived by employees as part of the management team, even though they were not formally managers: see *Taxi Taxi supra* at paragraphs 19-32. Conduct of persons who would be included in a bargaining unit as lead hands or working foremen may nevertheless be considered activities on behalf of an employer in appropriate circumstances: *Cambridge Canadian Foods supra* at paragraphs 35-42. In this case, the Employer set the stage for what happened by setting up the working foremen as its representatives for discouraging organization. Having selected the working foremen as its agents for that purpose, the Employer must now bear the responsibility for their actions.

57. That is not to say the Board believes that Guy and Yvon Chartrand ordered or orchestrated the Chase. The Board does not believe either Chartrand brother played a direct role in the Chase. Both of them had detailed and credible explanations of where they were and who they interacted with at the time the Chase took place. Their response to the prior Operating Engineers organizing drive had been measured, sophisticated and effective. Both Chartrand brothers presented themselves as canny, savvy and experienced businessmen in the witness stand. They are not the type to do "dirty work" themselves. However, they appear quite willing to have others do it for them, or at least to reap the benefits from it. Having unleashed loose cannons like Jason Suski and Denis Corbeil as their agents, the Chartrand brothers must accept the consequences of their decision.

58. Moreover, the conduct of the Chartrand brothers after they learned about the Chase reinforced the impression which a reasonable employee would have that Corbeil and Suski were acting on behalf of the Employer while engaging in the Chase. The witnesses made it clear that knowledge of the Chase had rapidly reached the ears of bargaining unit employees. Dwayne

Sutherland knew about it from speaking with Gilles Boileau, and Tim Patterson knew about it the next morning. The Union's supporters amongst the bargaining unit employees had heard about it and told Ian Copps they were scared because of it. However, Guy and Yvon Chartrand did nothing to disavow the Chase, or disassociate the Employer from it. Instead, Guy hosted a night long session of dinner and drinks at the CM where Corbeil and Suski partied with Guy until they closed the bar and took a cab to their homes. Nothing could make it more clear to bargaining unit employees that the Employer endorsed the actions of its working foremen on the Chase.

59. The Employer's actions after the Chase fall far short of dispelling the overwhelming evidence of Employer support for the Chase. The Board accepts that the Employer did terminate Denis Corbeil's employment, and demote Jason Suski and Gilles Boileau for their roles in the Chase. The latter two workers were never told the reasons for their demotions. There was no communication of those reasons to bargaining unit employees, no notification to bargaining unit employees that their right to join a trade union is protected by the Act, and no apology or any remedy of any sort offered to the Union. Bargaining unit employees would still be left thinking that what happened to the Union organizers on the Chase could happen to them if they supported the Union. No reasonable employee could be expected to sign a Union membership application after the Chase and the Employer's show of force at the CM. Those actions brought an effective and complete halt to the Union's organizing campaign, and prevented the Union from reaching the 40 per cent membership threshold needed for a representation vote.

60. In light of all the evidence in this matter and for the reasons set out above, the Board finds that the actions of the working foremen on the Chase are to be imputed to the Employer because they were agents acting on behalf of the Employer when they threatened and committed acts of violence against Union organizers. Therefore, the Employer has committed acts of intimidation and coercion which have interfered with the organization of a trade union and the employees' freedom to join a trade union in violation of sections 70, 72 and 76 of the Act.

(b) In all the circumstances, is the OPDC entitled to remedial certification under section 11 of the Act?

61. The Employer conceded in final argument that if the actions on the Chase were attributed to the Employer then remedial certification of the Union under section 11 would be appropriate.

62. The Employer's concession was wise and is fully supported by the jurisprudence. Section 11 of the Act provides as follows:

> **11.** (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
>
> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
>
> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed.

(2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,

(a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;

(b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or

(c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.

(3) An order under subsection (2) may be made despite section 8.1 or subsection 10(2).

(4) On an application made under this section, the Board may consider,

(a) the results of a previous representation vote; and

(b) whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

63. In this case, the OPDC concedes it is not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the OPDC at the time the application for certification was filed. The Board is satisfied this occurred as a result of the serious violations of sections 70, 72 and 76 of the Act by Chartrand as detailed above. These facts bring this case within the ambit of section 11(1)(b) of the Act. In order to grant the OPDC the remedy of remedial certification, the Board must answer the following question: Would any other remedy be sufficient to counter the effects of Chartrand's contravention of the Act?

64. The Board finds that question must be answered in the negative. The true wishes of employees in a bargaining unit cannot be expressed in a representation vote when they associate support of the trade union with the threat of violence. That is the case here. It is appropriate to grant remedial certification where: (a) there are threats of physical violence towards persons acting on behalf of a trade union: *East Elgin supra*; (b) a single serious incident in violation of the Act brings an organizing drive to a halt: *Swing Stage supra*; and (c) where the Employer's conduct is inherently coercive and intimidatory: *Riverstone Masonry supra*. All of these factors are present in the instant case. Any reasonable employee would feel intimidated from expressing his or her true wishes in a representation vote in an atmosphere where physical violence is associated with support of the OPDC.

65. Accordingly, the Board finds the OPDC is entitled to remedial certification under section 11 of the Act. The parties agreed on the appropriate bargaining unit description in the course of final argument. Therefore, the Board hereby makes the following rulings in the certification application:

(a) A certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the

> Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council in respect of all construction labourers in the employ of 450477 Ontario Ltd. Chartrand Equipment in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.
>
> (b) Further, pursuant to section 160(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of 450477 Ontario Ltd. Chartrand Equipment in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

(c) If the Employer has violated the Act, should any other relief be granted to the OPDC?

66. The OPDC asks for the following remedies in the unfair labour practice complaint: (a) a declaration that Chartrand has violated sections 70, 72, and 76 of the Act; (b) a cease and desist order; (c) damages for its organizing costs, including repairs to Mr. Copps vehicle; (d) a posting order; (e) an order that Chartrand publish a notice of the Board's decision, to be written by the Board, in the Timmins newspaper, for six consecutive publication dates.

67. In final argument, Chartrand argued that it had not violated the Act, but in the alternative submitted that even if it had, the broad relief sought by the OPDC was not warranted. In particular, Chartrand submitted that a posting was sufficient in addition to the declaration of violation of the Act. Chartrand submits that publication in a newspaper is not warranted, and neither is an award of organizing costs to the OPDC, noting that it may well be that an insurance company has already covered the cost of repairs to the Copps vehicle.

68. It must be borne in mind that the purpose of remedial orders in unfair labour practice complaints is to promote good labour relations by compensating the aggrieved party and putting it in a position where it would have been but for the violation. Draconian and punitive orders do not further the cause of good labour relations. Subsequent to the issuance of this decision, the parties must sit down and negotiate in good faith a collective agreement applicable to Chartrand's non-ICI construction activities in Board Area No. 19. The Board's remedies should be constructive ones that contribute to establishing harmony in the workplace, while yet sending a clear signal to Chartrand and its employees that the Chase and the conduct that led up to and followed it are unlawful and unacceptable.

69. To that end, the Board finds that a declaration, a posting order, and direct notification to Chartrand's present employees and those employed on the date of application is warranted. The employees must be notified in no uncertain terms that their right to join a trade union and their other rights under the Act are fully protected. The Board will not order Chartrand to pay for publication of a notice in the Timmins newspaper. The local newspaper and all other media are free to report on the result of this decision as they see fit. If it is newsworthy, they will report on it on their own.

70. There is no need for a cease and desist order as there is no proof of any ongoing misconduct by the Employer.

71. As for organizing costs, they are not an appropriate remedy where the Union is successful in obtaining a certificate: *East Elgin supra*. It would not be productive to focus on the cost of repairs to the Copps vehicle where insurance issues are no doubt involved. The parties' time is more productively spent in establishing a collective bargaining relationship.

72. In light of the foregoing, the Board orders the following additional relief to supplement the remedial certification granted to the OPDC under section 11 of the Act:

> (a) A Declaration that Chartrand has violated sections 70, 72 and 76 of the Act;
>
> (b) An Order that Chartrand at its own expense provide a copy of this decision to each current bargaining unit employee, and each person employed in the bargaining unit on the date of application; and
>
> (c) An Order that Chartrand post the "Notice to Employees" attached to this decision as Appendix "A" in the workplace where it will come to the attention of those employees who are affected by it and to keep that notice posted for a period of thirty days from the date of posting.

73. This panel shall remain seized of these matters in the event the parties encounter any issue arising from any of the remedies ordered herein.

Appendix "A"

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

This notice has been posted in compliance with an Order of the Ontario Labour Relations Board issued after a hearing. The Board has determined after a hearing that 450477 Ontario Ltd. Chartrand Equipment violated the *Labour Relations Act, 1995*. The Board concluded, as a result of these violations, that the true wishes of the employees could not be ascertained through the taking of a representation vote, and the Ontario Labour Relations Board certified the union as bargaining agent for the group of employees described as:

> all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the responding party in all other sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.

The Board informs the employees of the following:

All employees in Ontario have these rights which are protected by law:

> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
>
> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
>
> An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*, as amended.
>
> An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.
>
> It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

This is an official notice of the Board and must not be removed or defaced.
THIS NOTICE MUST REMAIN POSTED FOR 30 CONSECUTIVE DAYS.
Dated this 17th of February, 2010

2409-09-FC; 2784-09-R Labourers' International Union of North America, Local 625, Applicant v. **538203 Ontario Ltd., o/a Villa Construction**, Responding Party; Mark Klingbile, Applicant v. Labourers' International Union of North America, Local 625, Responding Party v. 538203 Ontario Ltd., o/a Villa Construction, Intervenor

Construction Industry – First Contract Arbitration – Practice and Procedure – Reconsideration – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD: February 2, 2010

Introduction

1. Board File No. 2409-09-FC is an application brought before the Board pursuant to section 43 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended ("the Act") in which the applicant ("the union" or "Local 625") seeks a direction that a first collective agreement be determined by way of arbitration. Board File No. 2784-09-R is an application filed with the Board pursuant to section 132 of the Act in which the applicant ("the applicant" or "Mr. Klingbile") seeks a declaration from the Board that Local 625 no longer represents the employees in a bargaining unit for which it is the bargaining agent.

Factual Background

2. The circumstances surrounding the filing and processing of these two proceedings appear to be somewhat unique.

3. On August 6, 2008, the union was certified as the bargaining agent for the employees of 538203 Ontario Ltd., o/a Villa Construction ("the employer" or "Villa") in the following bargaining unit:

> all construction labourers in the employ of 538203 Ontario Ltd., o/a Villa Construction in the Counties of Essex and Kent in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

4. On September 15, 2009 the union delivered a notice to bargain to the employer. On September 21, 2009 the union applied to the Ministry of Labour for the appointment of a conciliation officer. A conciliation officer was appointed, and the union and the employer met with that officer on October 28, 2009. No collective agreement was reached as a result of that meeting. On November 12, 2009 the union filed with the Board the application for first contract arbitration under section 43 of the Act. That proceeding was given File No. 2409-09-FC by the Board.

5. The first contract arbitration proceeding came on for hearing before me on December 11, 2009. At the end of evidence and argument, I issued an oral ruling directing the settlement of a first collective agreement between the applicant and the responding party by arbitration pursuant to subsection 43(2)(a) of the Act.

6. At the outset of the hearing on December 11, 2009, counsel for the employer advised the Board that on December 10, 2009 his client had received an application to terminate bargaining rights brought by Mr. Klingbile that reflected a filing date of December 10, 2009. Counsel provided the Board with a copy of the document that his client had received, and submitted that in the circumstances the hearing ought to be adjourned. Counsel for Local 625 advised that his client had not received that application and desired to proceed. The Registrar had earlier that same morning confirmed that no application to terminate bargaining rights in the name of Mr. Klingbile had been received by the Board. In the circumstances, and having regard to the need for expedition in first contract arbitration applications, I determined to continue with the proceeding as previously scheduled.

7. As noted above, at the completion of the hearing on December 11, 2009 I directed that a first collective agreement be settled by way of arbitration, pursuant to subsection 43(2)(a) of the Act. I indicated at that time that reasons for my decision would follow. Having regard to subsections 43(23.1) to 43(24) of the Act, I also indicated to the parties to that proceeding that I was prepared to reconsider my decision in the event that a termination application relating to the employer had in fact been filed with the Board by Mr. Klingbile.

8. On December 14, 2009, counsel for the employer filed with the Board an intervention in the termination proceeding on behalf of his client. As at that date, the Board had not physically received any termination application in the name of Mr. Klingbile. However, on December 15, 2009 the termination application previously delivered to the employer by counsel for Mr. Klingbile was received by the Board. It had been sent to the Board by way of Canada Post Priority Courier on December 10, 2009.

9. The union indicates that on and after December 14, 2009 it and its legal counsel made inquiries with the Board as to whether a termination application on behalf of Mr. Klingbile had in fact been filed. At approximately 12:00 noon on December 15, 2009, the termination application was finally delivered to the union by way of Priority Courier. As will be discussed in greater detail below,

the delay in delivery of the application to the union was the result of an error on the part of the law firm representing Mr. Klingbile, which directed the application to the wrong street address. The package was subsequently re-directed to the union's current office address. The application to terminate bargaining rights filed with the Board contains the union's old address and not its current address, which is reflected on the response filed by the union.

10. The union filed its response to the termination application on December 17, 2009. Amongst other grounds, it asks that the termination application be terminated or dismissed without a vote for the following reasons:

> (a) the application was not properly filed with the Board prior to the Board giving a direction on December 11, 2009 for the settlement of a first collective agreement by arbitration, and is of no effect pursuant to subsection 43(24) of the Act; and
>
> (b) the applicant failed to comply with Rule 24.3 because it failed to deliver the application to the union within two days of the purported filing date, failed to file a Certificate of Delivery to the Board within two days of the purported filing date, and the Certificate of Delivery that it eventually filed was inaccurate.

11. By way of decisions dated December 18 and 21, 2009, I directed that the parties to the termination proceeding file submissions with the Board regarding the relief sought by the union. Those submissions have now been filed with the Board. I have reviewed and considered those submissions, and the cases referred to therein, and I provide the parties with my decision on the relief sought by the union below.

Argument and Decision

12. In my view, the legal principles applicable to the determination of this issue are for the most part established by the decision of the Board in *Associated Contracting Inc.*, [1998] OLRB Rep. November/December 903. In that case, an individual brought an application to terminate bargaining rights on the last day of the statutory open period. He went to the local Canada Post office on April 30, 1998, the last day of the collective agreement, and registered or filed the application with Canada Post for delivery by Priority Courier. The application was received by the Board on Monday, May 4, 1998. On that same day, the individual registered or filed the application with Canada Post for Priority Courier delivery to the trade union and the company. The trade union received the application by Priority Courier on Wednesday, May 6, 1998.

13. The trade union in that proceeding argued that the filing date of the application was the date when Priority Courier actually sent the material to the Board, and not the day on which such material was filed with Priority Courier. The Board rejected that argument. At paragraphs 10 and 11 of that decision, the Board made the following comments:

> 10. The Board did not call on the other parties to respond to this argument. Pursuant to Rule 43o, in the construction industry the date of filing with the Board is the date on which the application is sent by Priority Courier. For purposes of affixing the application date under the Rules, the date an application is "sent" by Priority Courier is the date on which the application

> is accepted by Priority Courier, regardless of when Priority Courier actually delivers the application, and regardless of whether the application is received by Priority Courier after 5:00 p.m. on that particular day. …
>
> 11. Any other approach would defeat the purpose of the Rule, which allows the application date to be affixed by filing the application with Priority Courier. In the construction industry, both unions in certification applications and individual employees in termination applications must be able to know with certainty the application date for their particular application, since choosing the specific date has such singular importance. In both certification and termination applications, it is the wishes of employees at work on the application filing date that are taken into account …

Rule 43o is now Rule 24.2 of the Board's Rules of Procedure ("the Rules"). In this proceeding, it is evident that the termination application and supporting materials were left with Canada Post Priority Courier on Thursday, December 10, 2009 for delivery to Local 625 and Villa, as permitted by Rule 24.1. In accordance with Rule 24.2, the application filing date for the termination application is Thursday, December 10, 2009. Accordingly, the position taken by Local 625 that the application was not properly filed with the Board prior to the Board giving a direction on December 11, 2009 for the settlement of a first collective agreement by arbitration must be rejected.

14. A further issue was also raised in *Associated Contracting* that is raised in this proceeding. In that case, the trade union asserted that the individual seeking to terminate bargaining rights had not delivered the application to it as required by section 63(3) of the Act and Rule 43cc (that is now, in part, Rule 26.3). Section 63(3) of the Act reads as follows:

> The applicant shall deliver a copy of the application to the employer and the trade union by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

In *Associated Contracting*, although the application date was April 30, 1998, the application was not delivered to the trade union until May 6, 1998, four days later. The trade union submitted that the application must be delivered within two days of filing (as per Rule 43cc, now Rule 26.3), and that delivery is only effective upon receipt, and not upon filing the application with Priority Courier. The trade union asserted that the requirement to deliver within two days of filing is mandatory, failing which the application must be dismissed as not being properly filed.

15. The Board accepted this argument. The critical portions of the decision are contained in a lengthy passage that runs from paragraphs 16 to 24, which passage is set out below:

> 16. The importance of moving expeditiously through the procedures in a termination application is made evident in the scheme described in section 63 of the Act. Section 63(3) explicitly addresses the requirement to deliver the application to the employer and to the union, and states that such delivery must be effectuated no later than the day on which the application is filed with the Board, unless the Board has made Rules otherwise. The statutory intention is clear. Delivery of the application is to be made by the applicant directly upon the employer and the union, and is to be done so quickly. The

Legislature has also agreed, through section 63(3), to defer to the Board's rule-making powers with respect to allowing a time for delivery later than the date on which the application is filed. Such a deferral does not, however, minimize the legislatively expressed concern for expedition in delivery of the application. It would hardly be consistent with the statutory intention that delivery be prompt were the Board to make a rule requiring delivery, in a less than expeditious time. Although discretion is given to the Board, it must be exercised with reference to the need for expedition expressed throughout section 63, of which section 63(3) is only one example. …

17. It is in this context that the Board's Interim Certification and Termination Rules were made. With respect to delivery of the application to the employer and to the union, Rule 43cc requires delivery within two days of filing the application. Another Rule, Rule 22, gives the Board the ability to relieve against the strict application of Rule 43cc. Rule 27 allows the Board to shorten or lengthen any time period as set out in the Rules.

18. Local 793 argued that the Board has no jurisdiction to extend or waive the two day delivery requirement in Rule 43cc, in light of the wording of section 63(3). … The union asserted that a general rule giving the Board discretion to relieve from the application of other rules cannot stand in the face of the language of section 63(3), as it could not have been intended that the Board could set a time for delivery on a case by case basis. …

19. However, I am satisfied that the Board can exercise a discretion under Rules 22 or 27, and when it does so, it is acting in a manner authorized by and consistent with the provisions of subsection 63(3). This subsection allows the Board to determine when delivery "is required under the Rules made by the Board". The reference is to the "Rules" of the Board, and this refers to the Rules in their entirety, not only the rule that deals particularly with delivery times. Section 63(3) reflects a legislative recognition of the Board's expertise in determining appropriate delivery times for the application and a willingness to defer to that expertise as long as there are rules delineating delivery times. The expression of the Board's expertise in this respect is manifested not only through the provisions of Rule 43cc, but as well with reference to the Rules which allow the Board to make exceptions, to consider whether to relieve from the requirements of Rule 43cc (or any other Rule) in appropriate circumstances. Of course, when considering whether there is good reason to grant such relief, the Board will have a continuing regard for the need for expedition in termination applications, a need legislatively acknowledged in the numerous provisions of section 63 referred to earlier.

20. The question is whether the applicant has demonstrated appropriate circumstances here for relieving against the requirement in Rule 43cc to deliver the application within two days.

21. There could be a number of circumstances which would justify an exercise of the Board's discretion to extend the time or relieve from the delivery requirement. Perhaps if an applicant were to be misled by a responding union with respect to delivery requirements. Perhaps if an unexpected circumstance beyond the applicant's control occurred, preventing delivery that otherwise would have been timely. Whether the

> Board extends the time will depend upon all of the circumstances, including the reasons for the failure to deliver, the length of the delay in delivery, and prejudice to the other parties.
>
> ...
>
> 23. Even if the Board were to accept that the reason for the delay in delivery was that the applicant had misunderstood the Rules, the Board is not satisfied that such a mistake provides sufficient reason to extend the time. It is difficult to see how the two day delivery requirement in Rule 43cc would continue to have any meaning if an expressed misunderstanding of the relevant Rules would alone be enough to lead the Board to relieve from their requirements. The timing requirement for delivery of a termination application is a matter spoken to directly in the Act. The need for expedition is important enough that it has explicit statutory treatment.
>
> 24. Whether because no reason has been given for the failure to deliver in time, or because the only reason was a misreading of the Rules, the Board declined to relieve from the requirements of Rule 43cc. Delivery of the application to the union was not therefore made within the time required under the Rules. That requirement is mandatory (absent the granting of relief from it). An application is only properly made when it is filed and delivered. The consequence of failure to deliver in a timely manner is therefore that an application is not properly made. As the application was not made within the time prescribed by the Act, it was dismissed.

16. As in *Associated Contacting*, the question before the Board in this proceeding is whether Mr. Klingbile has demonstrated appropriate circumstances for relieving against the requirement in Rule 26.3 that he deliver the application to Local 625 within two days of its filing with the Board. Counsel for Mr. Klingbile states in his submissions that he attempted to deliver the application by facsimile on December 10, 2009. His offices could only obtain confirmation of partial delivery to Villa, and could secure no confirmation of delivery to Local 625. As a result, his offices determined to deliver the application by way of Canada Post Priority Courier.

17. With respect to the errant address, counsel for Mr. Klingbile states that his office delivered the application to Local 625 "at its long-standing Windsor address". Counsel notes that that address continued to be listed by Local 625 as its address on its website, and he included a one-page document printed from the Local 625 website confirming his assertion. Counsel also argues that even if the application had been delivered within the two day period, the application would have been physically received by Local 625 after the December 11, 2009 hearing date, and therefore submits that the late delivery to Local 625 is irrelevant to the issue of whether the Board's decision on December 11, 2009 ought to remain in place.

18. Counsel for Local 625 acknowledges that the Board has the discretion to relieve against the strict application of its Rules, and to lengthen time periods set out in the Rules, including the time prescribed for delivery of an application. However, Local 625 submits that on the facts of this case the Board should not exercise its discretion to relieve against the requirement of timely delivery. It relies upon the importance of timely delivery identified by the Board in *Associated Contracting*, and stresses that there is a heavy onus upon an applicant to demonstrate that the Board ought to exercise its discretion to relieve against late delivery, given the statutory requirement of timely delivery.

19. Turning to the facts of this proceeding, counsel for Local 625 acknowledges that the one day delay in delivery of the application is not lengthy. However, he asserts that it is a significant delay. In that regard, he notes that Local 625 would be greatly prejudiced if the Board were to grant the applicant an extension of time to deliver the application, because the effect of doing so would be to allow the termination application to "leapfrog" in front of the Board's direction for first contract arbitration that was made on December 11, 2009, contrary to the intention of subsection 43(24) of the Act. Counsel relies upon the Board's observations at paragraph 23 of *Associated Contracting* to the effect that the two day delivery requirement of Rule 26.3 would have little meaning if an expressed misunderstanding of the Rules alone could be enough to lead the Board to relieve against their requirements, in light of the fact that the timing requirement for delivery is a matter spoken to directly by the Act.

20. Counsel for Local 625 also notes that his client's current address was readily available on the Labourers' International Union of North America, Ontario Provincial District Council website. Furthermore, counsel notes that if the applicant had called the old telephone number of Local 625 which is identified on the face of the application, he would have been directed to the union's correct telephone number, and that by calling that number he could have obtained correct delivery information. Counsel asserts that the applicant did not make reasonable attempts to ascertain the proper address or facsimile number of Local 625 prior to sending out the application, and notes that the failure to properly deliver the application was not the result of something outside the control of the applicant.

21. In response to Mr. Klingbile's initial submissions, counsel for Local 625 notes that counsel for Mr. Klingbile is involved in at least one other Board proceeding involving Local 625, and therefore had in his possession the correct address and facsimile number for Local 625. With respect to Mr. Klingbile's reference to the Local 625 website, counsel for Local 625 states that the website in question was not an "official" website, but was put up long ago as a "placeholder" page in the event that the union decided to launch a future website. The website is not operational, had not been maintained, and its only content was the address that applicant's counsel included on the one page printout filed with the Board. Counsel for Local 625 notes that opposing counsel did not assert in his correspondence to the Board that he or his client had actually relied upon the webpage in any way at the time that the application was filed. In that regard, counsel speculates that the applicant likely secured the outdated delivery information from a Ministry of Labour letter dated September 22, 2009. He bases that speculation upon the fact that the Ministry of Labour misspelled the name of Mike Vieau, the Local 625 Business Representative, a misspelling that is carried over onto the face of the application filed by Mr. Klingbile. As such, counsel for Local 625 reiterates that any misunderstanding on the part of Mr. Klingbile was not the fault of Local 625.

22. In response to Local 625's initial submissions, counsel for Mr. Klingbile states that "the misunderstanding as to the Union's current address arises out of the failure of the Union to correct its own local web-site". He argues that Mr. Klingbile ought to be entitled to rely upon the information published by Local 625. Counsel also reiterates that, even if Local 625 had properly updated its website, it is possible that the application would not have been before the Board until December 14, 2009, and therefore after the Board's decision made on December 11, 2009.

23. Counsel for Villa made submissions to the Board that reiterated a number of the positions asserted by counsel for Mr. Klingbile.

24. For the reasons that follow, I am prepared to exercise my discretion pursuant to Rules 3.2 and 40.7 of the Board's Rules to extend the date for delivering the termination application to Local 625 to December 15, 2009.

25. Local 625 acknowledges that the delay caused by directing the application to its old address was short. Although it is accurate to say that the implications of exercising the Board's discretion to extend the date for delivery will prejudice Local 625, in the sense that the Act mandates in those circumstances a result that will negate the direction previously made that a first contract be determined by way of arbitration, prejudice of that nature is not the type of prejudice considered by the Board in these circumstances. For the purpose of extending the time for delivery pursuant to the Board's Rules, the Board looks to whether the late delivery has put Local 625 at a disadvantage in terms of being able to respond to the termination application itself. Here, no real prejudice resulted to Local 625 because it received the application only one day beyond the time frame required by the Board's Rules. Local 625 has filed a full response to the termination application, and does not state that it was unable to fully defend its position as a result of the delay in receiving the application.

26. Ultimately the responsibility for directing the application to the wrong address lies with the applicant. It is the applicant's responsibility to ensure that the application gets into the hands of Local 625 in accordance with the time limits contained in the Board's Rules. It may well be that had the applicant or his legal counsel been more careful on December 10, 2009, the error would have been discovered at that time. But even with that taken as a given, in light of the short delay and the lack of prejudice to the union, I am not prepared to terminate this proceeding for the sole reason that counsel for the applicant was not aware that the address of Local 625 had changed in the relatively recent past, and therefore directed the application to the wrong address.

27. There is one further argument made by Local 625 that needs to be addressed. Counsel for Local 625 asserted that the applicant's Certificate of Delivery indicates that the application was delivered to Local 625 no later than December 11, 2009. He notes that the Certificate of Delivery is not accurate, either with respect to the date or the location of delivery. Citing Rule 24.3 of the Board's Rules, counsel submits that the purpose of the Certificate of Delivery is to provide the Board with confirmation that the application and supporting forms have been delivered to the other party. Local 625 submits that an inaccurate Certificate of Delivery is no better than failing to file a Certificate of Delivery, and urges the Board to dismiss the application for failure to file an accurate Certificate.

28. Counsel cited one prior Board decision in support of this argument – *Watson, L G Construction Co. Ltd.*, 2002 CanLII 8127 (ON L.R.B.). In that proceeding, a certification application, the application had been filed with the Board on November 12, 2002. The Certificate of Delivery filed with the application indicated that the application had been delivered to an address in Brampton. One week later, the applicant advised the Board that the proper address of the responding party was actually in Markham, and indicated that the applicant was hand delivering copies of the application that very day. However, by the date of the decision, November 25, 2002, no Certificate of Delivery had been filed by the applicant confirming delivery of the application on November 19, 2002. In those circumstances, the Board concluded that the absence of a Certificate of Delivery was fatal, because the Board could not order a representation vote until the applicant had filed proof of delivery of the application and supporting materials to the responding party.

29. The circumstances before the Board in this proceeding are considerably different. The Certificate of Delivery was completed by a Legal Assistant at applicant's counsel's office on December 10, 2009, and indicated that she had been advised by Canada Post that the application would be delivered to Local 625 no later than December 11, 2009 at 12 noon. There is nothing inaccurate on the face of that Certificate of Delivery. Ultimately, the package was not delivered to Local 625 by 12 noon on December 11, 2009, for the reasons set out above. However, there is no question that Local 625 has now received the application. It has filed a full response. There is no reason why the Board cannot direct a representation vote.

30. I see no reason why the applicant should be required to file a second Certificate of Delivery in the circumstances. To require such a filing adds nothing of value to the Board File. None of the applicant, his solicitor, or his solicitor's Legal Assistant has any first hand information regarding the circumstances surrounding the actual delivery of the application. The most that any one of them could certify to the Board is that he or she understands from reviewing correspondence from counsel for Local 625 that the application was delivered to the union on December 15, 2009. The Board is already aware of that fact from having reviewed counsel's correspondence. As a result, this argument must be rejected.

31. Accordingly, for the reasons set out above, I exercise my discretion pursuant to Rules 3.2 and 40.7 of the Board's Rules to extend the date for delivering the termination application to Local 625 to December 15, 2009. The termination application was properly delivered to the union, and that proceeding should continue.

32. The termination application filed by Mr. Klingbile was filed with the Board on Thursday, December 10, 2009. Subsections 43(23) and (23.1) of the Act provide as follows:

> (23) In subsections (23.1) to (23.4),
>
> "decertification application" means an application for a declaration that a trade union no longer represents the employees in a bargaining unit;
>
> "displacement application" means an application for certification by a trade union, other than the trade union that represents the employees in a bargaining unit, as bargaining agent for those employees.
>
> (23.1) Subsection (23.2) applies if,
>
> (a) a decertification application or displacement application has been filed with the Board and before a final decision is made on it an application under subsection (1) is filed with the Board; or
>
> (b) an application under subsection (1) has been filed with the Board and before a final decision is made on it a decertification application or displacement application is filed with the Board.

33. It is evident that subsection 43(23.1)(b) applies to the circumstances before the Board. Before a final decision was made on December 11, 2009 in an application filed with the Board pursuant to subsection 43(1) of the Act (Board File No. 2409-09-FC), a "decertification application"

was filed with the Board by Mr. Klingbile on December 10, 2009. In these circumstances, the Board is directed by subsection 43(23.2) of the Act to deal with the decertification application before dealing with or continuing to deal with the application under subsection 43(1) of the Act. Although this provision applies somewhat awkwardly "after the fact" in the construction industry because of the ability of an applicant to file a termination application with the Board on a particular date by sending it to the Board by way of Canada Post Priority Courier, the Act nonetheless requires that a decertification application filed with the Board before a final decision is rendered in an application for a direction that a first contract be determined by way of arbitration be completely dealt with before the first contract proceeding is decided. Accordingly, Mr. Klingbile's application to terminate bargaining rights that was filed with the Board on December 10, 2009 must be determined first, before the application for a first contract direction filed by Local 625.

34. In the circumstances, I reconsider my decision in Board File No. 2409-09-FC dated December 11, 2009 directing that a first contract be determined by way of arbitration and revoke that direction in its entirety. Board File No. 2409-09-FC is adjourned *sine die*, pending a final decision by the Board in Board File No. 2784-09-R. As I have heard the evidence and argument in the former proceeding, I am seized of that proceeding.

35. In my prior decision in Board File 2784-09-R dated December 18, 2009, I indicated that the Board would not direct the taking of a representation vote. In light of this decision, it is appropriate at this time to direct the taking of a representation vote.

36. The applicant in Board File No. 2784-09-R has applied to the Board under section 63 of the Act for a declaration that the responding party no longer represents the employees in a bargaining unit for which it is the bargaining agent. As noted above, that application was filed with the Board on December 10, 2009.

37. On August 6, 2008, the responding party was certified as the bargaining agent for the employees of 538203 Ontario Ltd. in the following bargaining unit:

> all construction labourers in the employ of 538203 Ontario Ltd. o/a Villa Construction in the Counties of Essex and Kent in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

As of the date of the filing of this application, no collective agreement had been made. Having regard to the provisions of section 132 of the Act, the Board finds that this application is timely.

38. It appears to the Board on an examination of the evidence before it, that not less than forty per cent of the employees in the bargaining unit had expressed a wish not to be represented by the responding party at the time the application was filed.

39. The Board directs that a representation vote be taken of the employees of 538203 Ontario Ltd. o/a Villa Construction employed in the bargaining unit described in paragraph 37 above. All those employed in that bargaining unit and at work on the application filing date will be eligible to vote.

40. The vote will be held on Tuesday, February 9, 2010. The parties are directed to return a completed "Vote Arrangements in the Construction Industry" form attached as a Schedule to this decision directly to the Vote Coordinator within two (2) days of receiving this decision. Vote arrangements will be set out in the "Notice of Vote and of Meeting" to be provided to the parties by the Vote Coordinator prior to the vote.

41. Voters will be asked to indicate whether or not they wish to be represented by the responding party in their employment relations with 538203 Ontario Ltd. o/a Villa Construction. Having regard to the assertions made by Local 625 in its response to the termination application, the ballot box will be sealed until the parties otherwise agree to open the box, or until the Board orders the ballot box to be opened and any ballots cast counted.

42. The employer is directed to post one or more copies of this decision and of the "Notice of Vote and of Meeting" in a location or locations where they are most likely to come to the attention of those eligible to vote. These copies must remain posted for a period of 30 days.

43. Any party or person who wishes to make representations to the Board about any issue remaining in dispute which relates to the application for termination of bargaining rights, other than status disputes, must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within five (5) days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken. Representations with respect to any status disputes must be made in accordance with the directions provided in Information Bulletin No. 10: Status Disputes in Termination Applications in the Construction Industry.

44. The matter is referred to the Registrar.

1223-09-JD; 1224-09-JD Millwright Regional Council of Ontario and its Local 1007, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 and **Aker Kvaerner Songer Canada Ltd.,** Responding Parties v. Electrical Power Systems Construction Association ("EPSCA"), Intervenor; Millwright Regional Council of Ontario and its Local 1007, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 and E.S. Fox Ltd., Responding Parties v. Electrical Power Systems Construction Association ("EPSCA"), Intervenor

Jurisdictional Dispute – Intervenor – The Millwrights brought two applications in response to grievances filed by the Plumbers – EPSCA intervened in both applications, which relate to the same work in dispute performed at the same worksite – During mark-up meetings required by the collective agreement, to which all parties were bound, the work in dispute was assigned to the Millwrights; however, the work was done by the Plumbers – Both employers state that they did not change the work assignment and when they became aware that the Plumbers had done the work they directed that the work be performed by the Millwrights – The Plumbers argued that the work was finally assigned to them and that the Millwrights had

the onus of demonstrating that the work assigned to the Plumbers should be altered – The Board stated that it would not support efforts by parties to gain advantage by avoiding or ignoring the transparent processes contained in the EPSCA collective agreements – The Board held that the fact that the union to whom the work was not assigned did the work does not mean that there was a change made to the assignment – The Plumbers' challenge to the assignment of work in dispute came almost a year after they were aware of the assignment – As a result, the Board found it was not necessary to inquire further into the assignments of work – The Board exercised its discretion and was not prepared to consider the Plumbers' claim to the work in dispute – The assignments were not challenged in a timely manner – Board declares the work in dispute was properly assigned to the Millwrights.

BEFORE: *Charles E. Humphrey*, Vice-Chair.

APPEARANCES: *Jesse Nyman, Mich Sinclair* and *Ron Coltart* appearing for the applicant; *Jim Fyshe, Les Ellerker* and *Mark Ellerker* appearing for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67; *Daryn M. Jeffries* and *Carla Nassar* appearing for Aker Kvaerner Songer Canada Ltd.; *Keith Burkhardt* and *Bill Kunkel* appearing for E.S. Fox Ltd.; *M. Patrick Moran* and *Ron Martin* appearing for the Electrical Power Systems Construction Association.

DECISION OF THE BOARD: February 11, 2010

1. These are applications under section 99 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). There are two applications before the Board, one relating to E.S. Fox Ltd. ("Fox") and one to Aker Kvaerner Songer Canada Ltd. ("Aker"). The applicant in both applications is Millwrights Regional Council of Ontario and its Local 1007 ("the Millwrights"). The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 ("the Plumbers") is the responding party union. The Electrical Power Systems Construction Association ("EPSCA") intervened in both applications. The applications were filed by the Millwrights in response to grievances filed by the Plumbers.

2. Both applications relate to the same work in dispute performed at the same worksite. The work in dispute is:

> The *in situ* use of a machine to grind, power lap, polish and refurbish valve gates and seats at the OPG Nanticoke Generating Station.

3. The work in dispute is a small part of a large contract, covering a variety of work, awarded to Fox and Aker by Ontario Power Generation ("OPG"). The contract referred to as the Master Services Agreement is awarded for a period of three years. Both Fox and Aker have employees from various trades performing a variety of work at the Nanticoke Generating Station over the life of the Master Services Agreement. The work involves repair and replacement parts of the generating station systems.

4. The Plumbers and the Millwrights are both bound to collective agreements with EPSCA. The responding party employers are bound to these agreements. The collective agreements contain provisions describing how work assignments are to be made. The Plumbers' collective agreement

provides for a mark-up meeting to be held and states that, "the purpose of this mark-up process is to indicate to the union the work which is planned to be carried out by the Employer in order to minimize the potential for jurisdictional disputes". The collective agreement provides that following the mark-up meeting, "The Employer will advise the Union of the final assignments prior to the work commencing".

5. In accordance with the terms of the EPSCA collective agreements both Fox and Aker held mark-up meetings to deal with work assignments for the Master Services Agreement. Fox held its meeting on July 24, 2008. Aker's meeting was held on July 29, 2008. At the Fox mark-up meeting representatives of both the Millwrights and Plumbers were present. The minutes of that meeting indicate that both the Millwrights and the Plumbers claimed the work in dispute. The minutes also indicate that the final assignment of the work in dispute was to the Millwrights. It is not clear from the evidence exactly when the final assignments were communicated to the two unions but there seems to be no dispute that it was delivered in August 2008.

6. At the Aker mark-up meeting on July 29 representatives of both unions were present. The minutes of that meeting indicate that the Millwrights claimed the work in dispute. The Plumbers claimed the work in dispute when it took place away from the turbine floor. The final assignment of the work in dispute was to Millwrights. Again, it is not clear when the parties were provided with the final assignments but there appears to be no dispute that this occurred in August 2008.

7. When the work in dispute was actually performed is not entirely clear from the evidence before the Board. This is because the work in dispute was a small part of extensive work activities and because employer records do not provide the degree of detail necessary to identify with precision the time the work in dispute was done. From the material that is before the Board it appears that the work in dispute may have been performed by Aker employees on September 19, 2008 and October 2, 2008. In both cases as many as three employees may have been involved in performing the work. There is no evidence that the work in dispute was performed again by Aker employees until March of 2009. There is some evidence indicating that Aker employees performed the work in dispute on March 25, 26, 27 and 31, 2009. The evidence suggests that between three and four employees may have been involved in performing the work in dispute on those occasions. In the case of Fox the evidence of when the work in dispute was performed is even less clear. It appears that the work in dispute was performed by Fox employees at some point in March and April 2009.

8. While there is doubt about exactly when the work in dispute was performed between August 2008 and the end of April 2009 there is no dispute about the fact that when the work was done it was done by members of the Plumbers not the Millwrights. Given the work assignments made by both employers how it came about that the Plumbers rather than the Millwrights performed the work in dispute is not clear. Both employers say that they did not change the work assignment. They also say that until the situation was brought to their attention by the Millwrights in May 2009 they were not aware that the Plumbers were performing the work in dispute. The Millwrights say that they were not aware until May 2009 that the work in dispute was being performed by the Plumbers. They brought the issue to the attention of Fox and Aker as soon as they became aware that work was not being done in accordance with the assignment made in 2008. Both employers responded by directing that the work in dispute be performed by the Millwrights. The evidence is that as of May 28, 2009 the work in dispute was performed by Millwrights employed by Fox and Aker.

9. The Plumbers' brief filed in this matter describes the way in which the work in dispute came to be performed by the Plumbers as it being "finally assigned" to the Plumbers. Counsel for the Plumbers argued that since the work in dispute had been "finally assigned" to the Plumbers, the Millwrights had the onus of demonstrating that the work assigned to the Plumbers should be altered. In my view to characterize what happened with regard to the work in dispute after July 2008 as being "finally assigned" to the Plumbers does not accord with the facts.

10. Following the issuance of the Final Assignments by Fox and Aker in August 2008 the Plumbers took no public action to challenge or to change the assignment as communicated to them. That is, they did not communicate with either employer or the Millwrights, they did not seek redress under the collective agreement nor did they bring an application under section 99. From the perspective of the employers and the Millwrights the Plumbers accepted the assignment of the work made by Fox and Aker following the mark-up meetings in July. Unless one was aware of what was occurring intermittently on the shop floor an objective observer would have concluded that the Plumbers had accepted the July 2008 assignment of the work in dispute to the Millwrights.

11. Does the fact that the Plumbers performed the work in dispute after the formal assignment was made in July 2008 change the assignment? As we have indicated how it came about that the work in dispute was performed by the Plumbers is not clear from the evidence. Attempting to determine how this occurred is an undertaking for which the jurisdictional dispute resolution process contained in section 99 is ill suited. The process relies on written briefs, documentary evidence and declarations and generally does not and should not require the Board to engage in hearing evidence to determine whether a formally communicated job assignment was changed on the shop floor. Where a party claims that a formally communicated job assignment has been changed but an authorized employer representative has not made a decision to change the assignment and not communicated any such decision to affected parties they should not be surprised if the Board is unwilling to conclude that a change in assignment has in fact been made. One of the essential characteristic of an effective work assignment process is transparency. For a work assignment process to meet its objective, of avoiding conflict on job sites and the resort to self help in the form of strikes and slowdowns, it must be transparent. All interested parties must have the opportunity to express their positions, have those positions considered and know and be able to rely on the result of the process. The EPSCA collective agreements contain such a transparent process. The Board will not support efforts by parties to gain advantage by avoiding or ignoring such processes.

12. There may be situations where a job assignment can be said to have been properly changed on the shop floor after a formal job assignment has been made and communicated to the competing unions. Those situations will be rare and in any case would have to meet the requirement of transparency. It is not necessary or appropriate for me to speculate on, in what circumstances the Board would consider such an assignment effective. Whatever such circumstances may be they do not exist in this case. Here the Plumbers obtained the opportunity to perform the work in question in a manner that was lacking in transparency. Neither the responsible representatives of the employers or the Millwrights were aware of the fact that the work in dispute was not being done by the Millwrights. Once they became aware they acted promptly to enforce the work assignment.

13. Parties should be able to rely on the job assignments that are made and communicated to them. They should not be put in the position of having to be constantly vigilant for fear that the union that did not get the assignment finds a way to get the work anyway. In this case the work in dispute was performed infrequently. The work formed a very small part of the overall work activity. The

work in dispute was performed in conjunction with work that it is acknowledged was work of the Plumbers. The work in dispute was often performed in confined areas in a very large facility. All of these factors made it difficult for the Millwrights and indeed the employers to identify when and by whom the work in dispute was being performed. It is not in the interest of unions or employers that parties be in any way encouraged to take advantage of such situations to obtain work assigned to another union through a process mandated in their collective agreement. As the Board indicated in the *State Group Inc.*, [2006] O.L.R.D. No. 3357, September 13, 2006 at paragraph 14:

> … Where a formal mark-up is held and an assignment is made in writing, the fact that the assignment may have been adjusted on the ground has no bearing. The number of reasons for that adjustment are likely to be many, and no doubt would itself generate disputes about precisely why or whether it happened. If a trade union objects to the assignment made at a mark-up meeting, then its proper response is to file a jurisdictional dispute. This Board will not do anything to encourage "self-help" remedies on the ground during the course of work, nor will it create obstacles to getting the job done with the available resources when work progresses in a manner other than that planned or expected.

14. Counsel for the Plumbers argued that given that the Plumbers had the work "finally assigned" to them there was no reason for them to raise any issue about the assignment until the events in May 2009 which resulted in the Millwrights performing the work. Based on this argument, counsel said there had been no delay by the Plumbers pursuing their issues with the assignment because it was not until May 2009 that they lost the assignment. This position fails to distinguish between the assignment of work and the performance of work. In some situations it can be said that an employer by having the work performed by employees represented by a particular union has assigned that work to members of that union. This will likely be the case in situations where, for example, no formal mark-up meeting process is followed or mandated by a collective agreement and the employer simply directs that employees represented by a particular union do the work. However, that is not the situation in this case. In this case the collective agreement requires that a work assignment process be followed. That process was followed by the parties and an assignment made of the work in dispute. The fact that through some means the union to whom the work was not assigned did the work does not, in the circumstances of this case, mean there was a change made in the assignment. Rather, work was performed by the Plumbers members contrary to the assignment. The assignment was not changed by the Plumbers' members performing the work in circumstances where both the employers and the Millwrights were not aware that this was occurring. It is more accurate to characterize what has occurred in this case as the Plumbers performing work not assigned to them.

15. Having regard to the facts in this case it is the finding of the Board that the assignment of the work made by the two responding party employers in July 2008 was never changed. The assignment remained in place from the date it was issued through to the present. Given that the Plumbers did not openly challenge the job assignment after it was formally communicated to them in August 2008 they are deemed to have accepted the assignment of the work in dispute made by Acker and Fox in July 2008. The Plumbers did not openly question the assignment of the work in dispute until they filed grievances in June 2009 following the action of Acker and Fox to ensure that the 2008 assignments were followed. The Plumbers' challenge to the assignment of the work in dispute came almost a year after they were aware of the assignment. Given this it is not necessary for the Board to inquire further into the assignments of the work in dispute. Having regard to the transient nature of

the construction industry and the interest of all parties in prompt and final resolution of issues relating to work assignments the Board, in the exercise of its discretion, is not prepared to consider the Plumbers' claim to the work in dispute given that it was made almost a year after the formal assignment was communicated to them. The assignments were not challenged in a timely manner and therefore the Board declares that the work in dispute was properly assigned to the Millwrights.

2903-09-HS; 2906-09-HS Fanshawe College of Applied Arts and Technology, Applicant v. OPSEU, Local 109, OPSEU, Local 110 and Christopher Callaghan, Inspector, Responding Parties

Health and Safety – Interim Relief – The College and two of its unions were unable to come to agreement on the timely and appropriate statutory inspections of the workplace, which occupies approximately 100 acres of land and consists of almost 1,900 rooms or spaces – The Inspector ordered that the physical condition of the workplace be inspected once a month – The College appealed and sought a suspension of the order, asserting that the parties enjoyed a long history of regular and compliant inspections until the end of the last agreement – The Board held that a suspension of the order would not relieve the College of its obligations under the Act; there was no evidence to suggest that a suspension of the order would put employees at risk; a failure to suspend the order would considerably prejudice the employer; and the employer had pleaded a strong *prima facie* case for success on the merits of the appeal – However, the Board concluded although it could suspend the order under appeal, it had no jurisdiction to substitute a second order in the context of a suspension request - After consulting with the parties, the Board issued an interim order directing the parties to conduct inspections in accordance with a proposal proffered by the College – Suspension granted, appeal to be heard

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Robert Atkinson* for the applicant; *Laurie Kent* for the responding party unions; *Judy Chan* for the responding party Inspector.

DECISION OF THE BOARD: February 1, 2010

1. Board File No. 2903-09-HS is an application brought before the Board pursuant to subsections 61(3.4) and 61(7) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (the "Act") seeking the suspension of Order No. 1 issued by Inspector Christopher Callaghan in Field Visit No. 5730666 on November 30, 2009. The applicant has also filed an appeal of Order No. 1, which appeal has been assigned Board File No. 2906-09-HS. This decision deals only with the suspension request.

2. By decision dated January 19, 2009, the Board determined to consult with the parties regarding the suspension request, and in particular with respect to the relief sought by the applicant and the responding party unions in the materials they filed with the Board. On January 26, 2010 the Board consulted with the parties by way of teleconference.

I. What this Case is About

3. Fanshawe College of Applied Arts and Technology ("the College") is a college of applied arts and technology whose operations are conducted primarily at premises owned by the College in London, Ontario ("the London campus"). The College states in the materials it has filed with the Board that approximately 15,000 full-time, and 39,000 part-time, students are enrolled at the College, and that approximately 2,650 full-time and part-time employees are employed at the London campus.

4. The London campus occupies approximately 100 acres of land. The College buildings on the London campus are comprised of almost 1,900 rooms or spaces that occupy approximately 1.1 million square feet of space. The College is governed by two province-wide collective agreements between it and the Ontario Public Service Employees Union ("OPSEU"). One, with OPSEU, Local 110 ("Local 110") covers certain academic employees and the second, with OPSEU, Local 109 ("Local 109") covers full-time support staff employees. I will refer to Local 110 and Local 109 collectively in this decision as "the Locals".

5. There is one Joint Health and Safety Committee ("JHSC") for the London campus. The London JHSC consists of four members representing management, and two members from each of Local 110 and Local 109, a member and an alternate member, representing the unions. In 1999 the College and the Locals entered into an agreement regarding health and safety inspections at the London campus ("the JHSC Agreement" or "the Agreement"). As a result of an arbitration award in 2003, the subsequent JHSC Agreements have been entered into between only the College and Local 110. However, as will become evident below there is no dispute that Local 109 participated in the JHSC and in the workplace inspection process established pursuant to the Agreement.

6. One of the features of the 1999 Agreement was the creation of a zone inspection system. The College was divided into ten zones. Workplace inspections were conducted of these zones by ten worker zone inspectors who were not members of the JHSC. This process has remained in place under subsequent JHSC Agreements, including the most recent Agreement that expired on August 31, 2009. Under the most recent Agreement, higher risk areas were inspected eight times per year and the rest of the College's London campus was inspected two times per year.

7. The above-referenced inspection process was established in the context of subsections 9(23) to 9(28) of the Act, which provisions read as follows:

> (23) Subject to subsection (24), the members of a committee who represent workers shall designate a member representing workers to inspect the physical condition of the workplace.
>
> (24) If possible, the member designated under subsection (23) shall be a certified member.
>
> (25) The members of a committee are not required to designate the same member to perform all inspections or to perform all of a particular inspection.
>
> (26) Unless otherwise required by the regulations or by an order by an inspector, a member designated under subsection (23) shall inspect the physical condition of the workplace at least once a month.

> (27) If it is not practical to inspect the workplace at least once a month, the member designated under subsection (23) shall inspect the physical condition of the workplace at least once a year, inspecting at least a part of the workplace in each month.
>
> (28) The inspection required by subsection (27) shall be undertaken in accordance with a schedule established by the committee.

I will elaborate upon this later in this decision, but in essence the College and the Locals have historically recognized that inspecting the whole London campus workplace once per month is impractical. As a result, the parties have utilized the zone inspection system to inspect the workplace with an eye towards the process described by subsection 9(27) of the Act. The Ministry of Labour has been aware of the structure of the workplace inspection process adopted by the College and the Locals, and has not objected to it. As noted above, inspecting the London campus in accordance with the terms of the Agreement results in the higher risk areas being inspected eight times per year, and the rest of the London campus being inspected two times per year, which is in excess of the statutory standard established by subsection 9(27) of the Act.

8. When the College and the Locals were unable to agree on a renewal of the Agreement in 2003, Brian McLean was appointed as a mediator/arbitrator. Mr. McLean ultimately issued two decisions, one in 2003 and a second in 2004, the latter being an interest arbitration that determined the content of the Agreement. Mr. McLean's first award determined (for reasons that are not pertinent to this proceeding) that Local 109 could not be a party to the Agreement. Upon the expiry of the Agreement established by Mr. McLean's second award, the parties ultimately agreed to appoint William Kaplan as a mediator/arbitrator. Mr. Kaplan ultimately established by way of interest arbitration the terms of the next (and most recent) Agreement, which, amongst other things, eliminated the interest arbitration provision from the Agreement. The expiry date of that Agreement was August 31, 2009.

9. Upon the issuance of the Kaplan award, the College advised Local 109 in writing that it would maintain the structure, composition and workings of the JHSC and the inspection process involving members of the Locals, subject to potential review and change in the future.

10. The events leading up to the current state of affairs are said by the College to have as their genesis a proposal for a new JHSC Agreement between Local 110 and the College, which proposal was provided to Local 110 by the College in May, 2009. The proposal made by the College suggests several changes to the process then in effect. Local 110 did not respond to that proposal by August 31, 2009, at which time the JHSC Agreement then in place expired.

11. Section 5 of the Agreement provides for the ten inspection zones referred to above. The Agreement provides that Local 110 was to appoint one inspector for each zone, but could appoint up to one half of those inspectors from the members of Local 109. In practice there were appointed five zone inspectors from Local 110, and five zone inspectors from Local 109. In late August, 2009 the President of Local 109 advised the College that Local 109 had removed all of its zone inspectors and that there would remain only two inspectors from Local 109 - its worker member and alternate member on the JHSC. What triggered that decision is not entirely clear from the materials, but it appears from some of the documentation that the College and Local 109 were at odds regarding the

extent to which the alternate member from Local 109 ought to be released from her job duties in September in order to satisfy her JHSC obligations, including workplace inspections.

12. After receiving the above-referenced advice from Local 109, the Manager of Health and Safety Services for the College sought confirmation from the President of Local 110 that Local 110 would ensure that ten zone inspectors were available to continue with the London campus inspections. The College asserts in its application materials that the President of Local 110 did not respond to that request for confirmation. In fact, by way of e-mail dated September 13, 2009, the President of Local 110 advised the Manager of Health and Safety Services that she was of the view that she had no authority to appoint all ten (10) zone inspectors. The materials filed with the Board show that at the same time the College was seeking this confirmation from Local 110, the President of Local 109 was asserting that Local 110 had no authority to appoint members on behalf of Local 109. The materials establish that Local 110 never advised the College that it would appoint ten (10) zone inspectors in order to continue the inspections at the London campus.

13. The College ultimately came to the conclusion that the actions of the Locals had made the zone inspection system unworkable. In late September, 2009, the College wrote e-mails to the worker members of the JHSC and to the Locals, advising them that the College would from that point forward inspect the London campus in accordance with subsection 9(27) of the Act. The College advised the Locals that effective October, 2009 the entire College would be inspected once per year by inspecting part of the College each month, including July and August. Furthermore, the College advised Local 109 that the weekly paid release time extended to the Local 109 JHSC member and alternate member was in excess of that necessary for them to carry out their duties under the Act. Accordingly, effective October 5, 2009 time off would be provided in accordance with subsection 9(34) of the Act.

14. From October, 2009 through to the end of December, 2009, the workplace inspection process ground to a virtual halt, with the workplace parties upping the ante as opportunities to do so made themselves available. Moving ahead with its plan to inspect the London campus in accordance with subsection 9(27) of the Act, at the monthly JHSC meeting in October, 2009 the management representatives on the Committee presented the worker representatives with a list of areas of the College it desired to inspect in November. The worker members on the JHSC were asked to identify which of them would be assigned to complete the monthly inspection. The worker members declined to do so. However, during that same month the Locals had determined to each appoint five zone inspectors. As a result, the worker members submitted to the College an inspection schedule which contemplated inspecting the entire workplace each month using the ten zone inspectors. This was unacceptable to the College.

15. On November 2, 2009, the Manager of Health and Safety Services of the College sent an e-mail to the Locals and to members of the JHSC. In that e-mail, the College reiterated its position with respect to workplace inspections. The e-mail advised the Locals and the JHSC members that the zone inspection process previously in place would no longer be utilized for workplace inspections, and that workplace inspections would be conducted in accordance with subsection 9(27) of the Act. In that regard, the College specifically states that only the four workers on the JHSC would be allowed to conduct workplace inspections under the Act.

16. At a special JHSC meeting convened in early November, 2009, the same sequence of events occurred as had occurred at the meeting in October, 2009. The College provided a schedule of

proposed inspections of the London campus for the balance of 2009, and the worker members of the JHSC declined to volunteer themselves to perform those inspections. Instead, the worker members of the JHSC asked the College to supply manager names for their inspection schedule premised on inspecting the entire workplace each month with the ten zone inspectors. Approximately one week later at the regularly scheduled JHSC meeting the same lack of progress resulted. At that meeting the worker members determined that they would contact the Ministry of Labour. That call resulted in a visit from the Ministry Inspector on November 20, 2009, who subsequently issued Order No. 1, the order that the College desires the Board to suspend, on November 30, 2009.

17. Order No. 1 provides as follows:

> The employer shall ensure a member designated under the subsection (23) shall inspect the physical condition of the workplace at least once a month. At time of inspection it was observed that inspections of the physical condition of the workplace by the member designated under section 9(23) were not occurring.

18. Since the Inspector issued Order No. 1 there have been virtually no inspections at the London campus. The College points its finger at the Locals for this state of affairs, and the Locals point their fingers at the College.

19. The College states that it attempted to put into place an inspection schedule that complied with Order No. 1. It states that it has not been possible for the College to adhere to the schedule because the worker members of the JHSC have not made themselves available to fulfill their inspection responsibilities. The College claims that one of the two worker members from Local 109 was largely unavailable to perform her inspections. In fact, this worker member resigned from the JHSC on December 21, 2009. The other worker member, the President of Local 109, is said by the College to have not made herself sufficiently available to comply with Order No. 1. The College also states that on December 21, 2009, Local 109 advised the College that the two alternate worker members could no longer be used to conduct workplace inspections. Finally, the College states that on December 22, 2009, it proposed, on a without prejudice basis, that one additional worker member from each of Local 109 and Local 110 be added to the JHSC. As at December 23, 2009, the day before the suspension application was filed with the Board, no response had been received from the Locals.

20. The Locals vigorously dispute the characterization of the situation by the College. They state in their submissions that the College has done everything in its power to frustrate the inspection process in an effort to demonstrate that it is not practical to inspect the college once per month as is required by section 9(26) of the Act. The Locals complain that the College has failed or refused to schedule a mediation date to address the renewal of the Agreement, has failed or refused to allow zone inspectors to assist in inspecting the London campus, and, initially at least, refused to allow alternate members of the JHSC to assist in conducting inspections.

21. With respect to the mediation process, I note here that the parties have agreed upon the appointment of an experienced mediator to assist them in their negotiations towards a new Agreement covering the period after August 31, 2009. During the course of the consultation the parties advised that mediation is scheduled to take place on March 3, 2010. The College has refused to allow Local 109 to participate in the mediation because it is not a party to the Agreement.

II. What the College and the Locals Seek from the Board

22. The College seeks the following relief from the Board:

> (a) an order suspending the Inspector's order and replacing it with an order requiring inspections of the physical condition of the London campus workplace to be conducted by the two worker members of the London JHSC, in accordance with an inspection frequency chart provided by the College that effectively ensures that high risk areas would be inspected six times per year, medium risk areas would be inspected four times per year, and low risk floors would be inspected two times per year; and
>
> (b) an order that, within 15 days of the order, the London JHSC agree upon a time schedule for inspections, implementing the above-referenced frequency chart, to be conducted by the two worker members of the London JHSC, failing which the Board will determine such schedule.

Alternatively, the College asks for:

> (c) the Board to issue an interim order pursuant to subsection 61(7) and/or subsection 61(3.4) of the Act that the physical condition of the workplace at the College's London campus be inspected by the two worker members of the London JHSC, in accordance with the above-referenced frequency chart; and
>
> (d) an order that, within 15 days of the order, the London JHSC agree upon a time schedule for inspections, implementing the above-referenced frequency chart, to be conducted by the two worker members of the London JHSC, failing which the Board will determine such schedule.

The Locals, on the other hand, submit that the Board ought not to suspend Order No. 1 at all. However, the Locals do ask that the Board vary the order so as to permit the utilization of the zone inspection system. They desire to use the ten appointed zone inspectors to effect the monthly inspections required by Order No. 1.

III. Applicable Legal Principles

23. In dealing with a request to suspend an order, the Board's approach is set out succinctly in *The Regional Municipality of Hamilton-Wentworth*, [1998] OLRB Rep. Aug. 709:

> Three factors have generally been considered by the Board when determining whether a suspension of an order is appropriate in the circumstances:
>
> a) whether the suspension of the order (or, alternatively, the failure to suspend the order) would endanger worker safety;
>
> b) the prejudice to the parties if the order is or is not suspended; and
>
> c) whether there is a strong *prima facie* case for a successful appeal of the order.

The onus lies upon the party desiring the suspension of an order to establish that the order ought to be suspended. Furthermore, the decision of Adjudicator Herman in *General Motors of Canada Limited*, [1997] O.O.H.S.A.D. No. 62, establishes that a certain degree of deference must be afforded to decisions made by inspectors for the purpose of considering the suspension of these orders pending their appeal. In the absence of some persuasive reason to interfere with that order pending the hearing of the appeal on the merits, the original order should not be suspended.

IV. Decision

24. Before considering Order No. 1 in light of the above-referenced factors, it is important to appreciate just exactly what it is that Order No. 1 does.

25. The second sentence contained in Order No. 1 provides the context of that order in a nutshell. The Inspector notes that, at the time of inspection, it was observed that inspections of the physical condition of the workplace by the members designated under subsection 9(23) of the Act were not occurring. Subsections 9(23) and 9(24) of the Act require the members of the JHSC who represent workers to designate a member or members amongst its group to inspect the physical condition of the workplace. The Inspector came to the conclusion that those inspections were not being performed.

26. The substance of Order No. 1 is set out in the first sentence of the order itself – the College is ordered to ensure that a member designated under subsection 9(23) of the Act inspects the physical condition of the workplace at least once per month. This is the obligation imposed upon the workplace parties pursuant to subsection 9(26) of the Act. At least once per month a member designated under subsection 9(23) of the Act is to inspect the physical condition of the workplace. Order No. 1 effectively says to the College that it must ensure that the designated member or members under subsection 9(23) (and subsection 9(25)) of the Act carry out his or her inspection of the workplace at least once per month.

27. With that in mind, I turn first to the question of whether the suspension of Order No. 1 would endanger worker safety. The Locals assert that suspending the order will jeopardize employee health and safety. They state that the established practice in place whereby only part of the workplace is inspected on a monthly basis does not assure the health and safety of the workers. They further assert that workers have already been involved in workplace accidents and have suffered injuries as a result of the failure of the College to comply with its obligations under the Act, and argue that it is not necessary for an accident to occur in order to trigger the protections of the Act.

28. In support of the above-referenced argument, the Locals state that in 2005 the College was selected to be part of a High Risk Initiative established by the Ministry of Labour because of the high number and severity of worker injuries. The College does not deny this assertion. As a result, the Locals assert that the College is a dangerous workplace. The Locals note that in mid-March, 2007, the Inspector attended at the London campus as part of the High Risk Initiative and made approximately 150 orders to remedy violations of the Act. Copies of those orders are included with the Locals' response. The Locals also note that the College was issued an order in December, 2007 with respect to a critical injury that occurred at the College, and that in February, 2008, three orders were issued to the College dealing with the need of the College to perform an asbestos abatement examination.

29. The College disputes that the suspension of Order No. 1 would endanger worker safety. It states that Order No. 1 was issued by the Inspector because the JHSC could not agree upon a schedule of inspections, and not because of injuries suffered by employees or because of known hazardous or potentially hazardous conditions in the workplace. It proposes that, pending the hearing of the appeal, the workplace be inspected by the two worker members of the JHSC, with high risk areas being inspected six times per year, medium risk areas being inspected four times per year, and low risk areas being inspected two times per year. It proposes that at least three areas be inspected each calendar month, and states that on the basis of this schedule the London campus would be inspected twice per year, which is in excess of the annual inspection that is anticipated by subsection 9(27) of the Act.

30. With respect to the orders arising out of the High Risk Initiative, the College states that in March, 2008, the Ministry of Labour removed the "high risk" status imposed upon the College. The College notes that none of the orders relied upon by the Locals arose out of any accident or injury at the College, and states that the critical injury in question occurred on a Sunday in one of the student residences on campus. The residence was managed and operated by a third party, and as an employer that third party had its own joint health and safety committee that was responsible for conducting inspections of the residence workplace. The JHSC and Locals were notified of the critical injury four hours after the accident, and the order in question directed the College to notify them immediately should there be any future incidents.

31. The Ministry takes no position with respect to the College's request for a suspension of Order No. 1, and therefore made no submissions regarding this factor.

32. Having regard to the material before the Board, I am of the view that suspending Order No. 1 would not endanger worker safety. I reach this conclusion for a number of reasons. First, I start with the following observation from Arbitrator McLean in his second arbitration decision dated February 27, 2004, at page 20:

> "... It is apparent that under the OHSA workplaces are ideally to be inspected once per month. However, the legislature saw the impracticality of that requirement for larger employers and did not want to burden the JHSC's in such workplaces. In the London Agreement the parties reached a compromise which in my view was intelligent and practical. On the other hand, *I must acknowledge that the College is not a dangerous workplace on the whole* and that the annual inspection requirements of the OHSA apply to all workplaces including the most dangerous. ..." (emphasis added)

Arbitrator McLean's observation that the workplace *on the whole* is not dangerous is intuitive. As a general observation, working at the College does not regularly expose workers to a high risk of serious injury. Yet, as is evident from the orders made by the Inspector in 2007 as part of the High Risk Initiative (and as is implicitly conceded by the College, which characterizes work areas as attracting either "high" "medium" or "low" risk of injury), there are certain areas of the College that are more dangerous than others (the automotive shop, the wood/machine shops, the kitchen and hospitality areas, and the maintenance areas, for example). I approach my assessment of whether suspension of Order No. 1 would put workers at risk with this in mind.

33. The Locals assert in their submission that workers have already been involved in workplace accidents and have suffered injuries as a result of the College's failure to comply with its

obligations under the Act. That may be the case. However, there is absolutely no evidence before the Board to establish that assertion. None of the orders that have been placed before the Board by the Locals resulted from a workplace injury except for that order arising from the 2008 critical injury. The College states that that injury involved a different employer in an area of the London campus that was not under its control, and that the order issued by the Ministry clearly related to the notification obligation and nothing else. Neither the Locals nor the Ministry assert otherwise.

34. The large number of orders that resulted from the High Risk Initiative cut both ways for the Locals. On the one hand, it is evident from a review of those orders that the Inspector found a number of violations of the Act as a result of his inspection in March, 2007. Some of the orders were relatively minor in nature, but the majority of them were not. There were a number of stop work orders amongst the orders made. Accordingly, the violations of the Act and the regulations discovered in March, 2007 were not all trivial or minor in nature.

35. On the other hand, the issuance of the orders in question in March, 2007 and the lack of any meaningful orders since that time suggest that, to the extent that there may have been a health and safety issue at the College in 2007, that issue no longer exists. I note here that each of the March, 2007 Premise/Project Forms containing the orders in question also contain the following language as part of the Narrative provided with the orders made:

> The notice of compliance shall be returned to the Ministry of Labour stating what was done to comply with the orders, date completed and signed by the employer representative. A JHSC member (or worker selected by the other workers) signature is required, agreeing or disagreeing with the information provided by the employer, as per section 59 of the Occupational Health and Safety Act (OHSA/90).

There is nothing in the materials filed by the Locals to suggest that the College did not satisfy its obligation to comply with the orders made in March, 2007, and that the notices of compliance due to be returned to the Ministry of Labour confirming compliance were not returned as required. Furthermore, with the exception of the order arising from the critical injury in early 2008 and the February, 2008 order requiring that an asbestos abatement examination be undertaken (the result of which was not included with the materials filed), there is no evidence of any orders having been made by the Ministry with respect to health and safety matters at the College.

36. Finally, as will be discussed in greater detail below, it is important to keep in mind that suspending Order No. 1 does not suspend the statutory obligations contained in subsections 9(23) to 9(28) of the Act. The Act still applies, and the obligations contained in the Act relating to the JHSC, and its role and obligations in the workplace, still apply.

37. For these reasons I disagree with the Locals' assertion that suspension of Order No. 1 would put employees of the College at risk.

38. The second consideration typically considered by the Board in determining whether an order ought to be suspended is the relative prejudice to the parties should the order be suspended or not be suspended. In this regard, the College asserts that refusing to suspend Order No. 1 will have a negative effect on it. The College states that in excess of 90 percent of the space allotted for educational and related purposes is used between the hours of 8:00 a.m. and 9:00 p.m. each day. As a

result, inspecting the whole workplace each month disrupts classes and other College activities, which disruptions negatively impact the learning environment. The College estimates that it takes approximately 99 hours to inspect the entire London campus once per month. The College also notes that the collective agreement with Local 110 provides that academic employees are entitled to two consecutive months of vacation per year, and asserts that Order No. 1 will be difficult to comply with in the summer months. The College also asserts that it put an inspection schedule into effect upon receiving Order No. 1 and has not been able to secure the co-operation of the worker members of the JHSC in order to comply with the order.

39. As a result of the above factors, the College states that it is impractical to inspect the physical condition of the London campus on a monthly basis. It asserts that complying with Order No. 1 will require that an inordinate, unreasonable and unnecessary amount of time and human resources be placed on inspections rather than on addressing legitimate health and safety concerns – which is both potentially detrimental to the workers and costly to the College. Finally, the College notes that it is exposed to prosecution for failing to comply with Order No. 1 should it not be suspended.

40. The Locals state that there will be prejudice to the workers should Order No. 1 be suspended. They state that should the order be suspended, previously identified workplace hazards will not be inspected, followed up or remedied for at least another two to six months, depending upon their location. Based upon the previous poor record of the College with respect to workplace safety, the Locals state that it is doubtful that any hazards would be rectified promptly in the absence of a monthly inspection. As a result, the Locals assert that suspension of Order No. 1 would continue to expose workers to unnecessary risks, and would ensure that "workplace accidents will continue to be common at the College".

41. The Locals assert that the College has over-exaggerated the difficulties associated with inspecting the workplace on a monthly basis. They note that the College had, for quite some time, failed to utilize the alternate members of the JHSC to conduct inspections, and that it was only when other worker members had either quit or gone on vacation that the College began using alternate members. Furthermore, the Locals note that the College is not prepared to use the zone inspectors to conduct inspections. The Locals state that even though more time would be used to inspect the workplace, that time would eliminate work time spent dealing with previously unearthed health and safety issues and would potentially reduce workplace accidents.

42. First, I reiterate here a point made above. No evidence has been put before the Board to establish that workplace accidents are "common at the College". Furthermore, based upon the materials that have been provided to the Board for the purposes of this application, the "previous record" of the College is not as "poor" as the Locals assert it to be. If there is evidence to this effect, it has not been placed before the Board by the Locals.

43. In my view, considerable prejudice will accrue to the College should Order No. 1 not be suspended. The process required by Order No. 1 is time consuming and unwieldy. The Agreement that the parties have historically negotiated to deal with health and safety inspections has included a process that utilized ten zone inspectors to perform monthly inspections of part of the workplace in accordance with subsection 9(27) of the Act. As noted by arbitrator McLean in the passage set out above in paragraph 32, adopting and implementing such a compromise was "intelligent and practical". By adopting such a process pursuant to subsection 9(27) of the Act, the parties must be

seen as having acknowledged that it was "not practical to inspect the workplace at least once a month".

44. In that light, I disagree with the Locals' assertion that the College has over-exaggerated the difficulties associated with inspecting the workplace on a monthly basis. The College has set out, in some detail, its efforts to comply with Order No. 1 and to ensure monthly inspections of the workplace since Order No. 1 was issued on November 30, 2009. Those efforts have been spectacularly unsuccessful. Of some significance, in their response to this application the Locals have not denied the vast majority of the factual assertions made by the College regarding its efforts to engage the two (and, subsequently, one) worker members of the JHSC to inspect the workplace on a monthly basis since November 30, 2009. Except to the minor extent that the Locals have denied those assertions, the Locals must be taken to have acknowledged the facts pleaded by the College for the purposes of this suspension request. On a similar note, one can infer from the position taken by the Locals on remedy (to maintain Order No. 1, but to permit the use of the ten zone inspectors to complete the monthly inspection of the entire workplace) that strict compliance with Order No. 1 is not particularly practical for the worker members of the JHSC either. Quite simply, strict compliance with Order No. 1 is not as practical or convenient as the Locals assert in their submissions.

45. After considering all of the materials and submissions of the parties, I conclude that considerable prejudice will accrue to the College should Order No. 1 not be suspended pending the appeal on the merits. I do not believe that the workers at the College will be particularly prejudiced should the order be suspended.

46. Finally, I turn to the factor of whether there exists a strong *prima facie* case for a successful appeal of Order No. 1. The College asserts that it has a very strong case for succeeding on the appeal. The College states that it is not practical to inspect the workplace on a monthly basis, and it seeks relief that would move the parties back into an inspection regime under subsection 9(27) of the Act. To that end, in Board File 2906-09-HS the College seeks an order that Order No. 1 be quashed, an order that the physical condition of the workplace at the London campus be inspected in accordance with subsection 9(27) of the Act, and an order that within 15 days of the Board's order, the JHSC agree upon a schedule of inspections to be conducted by the two worker members of the JHSC under subsection 9(27) of the Act, in accordance with subsection 9(28) of the Act. In the event that no such schedule is agreed upon, the College asks that the Board set the schedule.

47. The Locals assert that there is nothing unusual about Order No. 1, or the circumstances surrounding its issuance, that ought to cause the Board to conclude that the order is likely flawed or that the appeal will likely succeed. The Locals note that the Board jurisprudence supports the proposition that it is an inspector who has the statutory duty to administer and enforce the Act, and that an inspector's decisions should not be suspended prior to a hearing on the merits unless the applicant demonstrates compelling grounds to do so (see *General Motor of Canada Ltd.*, cited above, at paragraph 14). Here, the Locals assert that there is no reason identified by the College that compels the Board to suspend Order No. 1. The Locals assert that Order No. 1 is an informed expression of the Inspector's health and safety expertise, which was supported by his first-hand examination of the relevant facts. In those circumstances, there is no reason to conclude that the College's appeal will succeed on the merits.

48. In addition, the Locals rely upon the deference that is typically afforded to inspectors by the Board. The Locals note that the Inspector is familiar with the College, has the ability to identify potential hazards at the workplace, and that the matters in issue fall squarely within his area of expertise. In the circumstances, the Locals state that it is appropriate to extend to the Inspector the deference usually granted by the Board.

49. In the circumstances before the Board, I have concluded that the College has established a strong *prima facie* case for a successful appeal of Order No. 1. I reach this conclusion because it is evident that the position taken by the College – that Order No. 1 ought to be quashed because "it is not practical to inspect the workplace at least once per month", and therefore that any order issued ought to trigger the process envisioned by subsection 9(27) of the Act – is the same position that the College and the Locals themselves adopted from 1999 to September, 2009. In light of the previous "intelligent and practical" decision made by the College and the Locals, the position taken by the College – that Order No. 1 is wrong and ought to be quashed – appears to have merit. I find that the College has established, on a *prima facie* basis, that it is impractical to inspect the entire workplace on a monthly basis.

50. I agree with the jurisprudence that establishes the principle that the Board must offer inspectors considerable deference when considering their orders for the purposes of a suspension application. Here, however, it is clear why the Inspector issued Order No. 1. The workplace inspection process adopted by the parties in the Agreement was not being applied. Workplace inspections were not being performed, and the Inspector had to do something to get them started once again. However, for the reasons set out above, the position of the College on the main appeal appears to have merit, there will be considerable prejudice to the College should Order No. 1 not be suspended pending the main appeal, and the suspension of Order No. 1 will not endanger worker safety. Accordingly, I am prepared to suspend Order No 1.

51. I should note here that the College specifically relied upon two prior decisions of the Board in support of its request that Order No. 1 be suspended – *Carmeuse Lime (Beachville) Limited*, [2004] OLRB Rep. March/April 257 (March 31, 2004) and *Huron Perth Healthcare Alliance (Stratford General Hospital)*, 2006 CanLII 9115 (ON L.R.B.). Although applications to the Board requesting suspension of an inspector's order are always fact driven, the approach I have adopted in this decision is consistent with that taken by the Board in both of the above decisions.

52. I turn now to the question of relief. As noted above, the College seeks the following relief:

> (a) an order suspending the Inspector's order and replacing it with an order requiring inspections of the physical condition of the London campus workplace to be conducted by the two worker members of the London JHSC, in accordance with an inspection frequency chart provided by the College that effectively ensures that high risk areas would be inspected six times per year, medium risk areas would be inspected four times per year, and low risk floors would be inspected two times per year; and
>
> (b) an order that, within 15 days of the order, the London JHSC agree upon a time schedule for inspections, implementing the above-referenced frequency chart, to be conducted by the two worker members of the London JHSC, failing which the Board will determine such schedule.

In the alternative, the College asks for:

> (c) the Board to issue an interim order pursuant to subsection 61(7) and/or subsection 61(3.4) of the Act that the physical condition of the workplace at the College's London campus be inspected by the two worker members of the London JHSC, in accordance with the above-referenced frequency chart; and
>
> (d) an order that, within 15 days of the order, the London JHSC agree upon a time schedule for inspections, implementing the above-referenced frequency chart, to be conducted by the two worker members of the London JHSC, failing which the Board will determine such schedule.

53. I am not satisfied that the Board has the jurisdiction to make the order sought by the College pursuant to subsection 61(7) of the Act. That subsection provides that on an appeal under subsection 61(1) of the Act the Board "may suspend the operation of the order appealed from pending the disposition of the appeal". For the reasons set out above, I am prepared to suspend Order No. 1. However, subsection 61(7) of the Act does not provide the Board with the authority to make a new order or to revise or otherwise alter an original order of an inspector. Subsection 61(4) of the Act provides the Board with such powers, but only with respect to the main appeal under section 61 of the Act. This view has been adopted in at least one Board proceeding previously (see *City of Toronto*, 2003 CanLII 4752 (ON L.R.B.), at paragraphs 8 to 10). I agree with the observations made by the Board in that decision. I conclude that I am not authorized by subsection 61(7) of the Act to provide the remedy sought by the College.

54. The alternate position taken by the College is that the relief it seeks is available pursuant to subsection 61(3.4) of the Act. Amongst other things, subsection 61(3.4) of the Act provides that the Board may make any interim order it considers appropriate after consulting with the parties. In my view, the wide powers given to the Board by subsection 61(3.4) of the Act provides me with broad remedial options in this proceeding. Subsection 61(3.4) of the Act provides the Board with the authority to make a temporary, interim order to ensure that the purposes of the Act are achieved pending the disposition of the main appeal. In accordance with subsection 61(3.4) of the Act, the Board scheduled a consultation by way of teleconference and heard the argument of the parties with respect to the issues in dispute in proceeding, and in particular with respect to the relief sought by the parties, on January 26, 2010.

55. In each of *Carmeuse Lime (Beachville) Limited* and *Huron Perth Healthcare Alliance (Stratford General Hospital)*, cited above, the applicant employer indicated that if the inspector's order requiring monthly inspections were to be suspended, it would re-institute and apply a previously relied upon workplace inspection process that had been in place in its workplace for over 25 years. The College and the Locals could have adopted the same position in this proceeding, as there exists an inspection process that has worked reasonably well for the workplace parties for 10 years. Regrettably, neither the College nor the Locals take that position. None of the workplace parties is prepared to reinstitute the process that is contained in the Agreement that expired on August 31, 2009.

56. Irrespective of the position taken by the workplace parties, I have considered issuing an interim order pursuant to subsection 61(3.4) of the Act requiring the parties to implement the inspection process contained in the Agreement, or something akin to that process, until the appeal of

Order No. 1 is heard on the merits. To do so would have the advantage of returning the workplace parties to the position that they were in at the point that the Agreement expired. The parties are aware of the inspection process required by the Agreement and therefore any difficulties implementing the process on a temporary, interim basis would be minimal.

57. I have concluded that it is not appropriate to do so. The process dictated by the Agreement requires the use of workplace zone inspectors who are not members of the JHSC. It is not clear to me that the Board has the authority under the Act to require the parties to conduct workplace inspections through non-members of the JHSC. Zone inspectors were a critical element of the workplace inspection process up to September, 2009. As any interim order reinstating the process used by the College and the Locals in the past would necessarily require the use of zone inspectors who are not members of the JHSC, I do not consider it appropriate to order the parties to implement the inspection process contained in the Agreement.

58. In my view, any order I make must ensure that workplace inspections are reinstituted as soon as reasonably possible. No meaningful inspections have been carried out at the London campus for at least four months, and the health and safety of the employees of the College (and, of course, all others who attend at the London campus) has been given short shrift by the College and the Locals in lieu of accusations, finger-pointing and a healthy amount of game playing. In that regard, it is evident from the written materials placed before the Board that the relationship between the College and the Locals has for the most part broken down, at least to the extent that it relates to the JHSC and the workplace inspection process. I do not intend to single out any one party in this regard, as the written materials filed with the Board reflect that no one party has managed to consistently take the high road with respect to the continued implementation of workplace inspections. However, the failure of the College and the Locals to deal constructively with the question of workplace inspections is a factor that I must keep in mind in fashioning an interim order. What is required is a workable inspection process that meets the standard contained in the Act and can be implemented immediately without a great deal of conflict between the College and the Locals. At the same time, the parties should be provided with an opportunity to negotiate a renewal agreement, consistent with the concept of the internal responsibility system that underlies the Act.

59. In the circumstances, I am prepared to order, on an interim basis, relief generally in the nature of that sought by the College. The College has included with its materials a proposed inspection schedule for the London campus. The schedule divides up the London campus by building and floor, contains a hazard assessment of each floor and common service/public areas completed by the College's Health and Safety Services department. As noted above, if followed the schedule is structured so to ensure that, on an annual basis, those areas of the London campus identified as "high risk" will be inspected six times per year, those areas that are identified as "medium risk" will be inspected four times per year, and those areas identified as "low risk" will be inspected twice per year. At least three areas will be inspected each month, and an "end to end" inspection of the campus will occur at least twice per calendar year. Although the Locals may well have legitimate disagreements regarding the assessments of risk made by the College, no such disagreements were identified in the materials filed by the Locals in response to the application. At the very least, the protocol suggested by the College will get workplace inspections back on track sooner rather than later, at a frequency that exceeds the standard contained in subsection 9(27) of the Act.

60. One aspect of the relief sought by the College that I will not direct is its request that the Board order the workplace inspections to be performed by "the two worker members of the London

JHSC". As noted above, the JHSC currently consists of four management members and four worker members. The latter group includes a worker member and an alternate worker member from each of Local 109 and Local 110. It is not clear to me whether the full complement of four worker members has been appointed to the JHSC at this time.

61. As I understand it from the materials filed with the Board, the College asserts that only the two worker members of the JHSC (as distinct from the two worker "alternate members" of the JHSC) ought to be entitled to perform workplace inspections. I disagree with that assertion. No matter how the worker members of the JHSC characterize themselves for their own purposes, all four of the worker members of the JHSC are "members" for the purposes of subsections 9(23) to (25) of the Act. Accordingly, there is no legitimate basis for the College to assert that only the two individuals identified as "members" by the Locals ought to be permitted to effect workplace inspections.

62. The other aspect of the relief ordered that is different from that sought by the College is its duration. The College seeks an interim order suspending Order No. 1 until the Board determines the main appeal on the merits. Realistically, even if the hearing of this appeal is expedited the determination of the appeal on the merits will take considerable time. Having regard to the fact that it is always preferable for the parties to reach a consensus on the terms of a renewal agreement rather than to have those terms dictated by the Board, the parties should be provided with an opportunity to negotiate the terms of such a renewal agreement as soon as reasonably possible.

63. As noted above, on March 3, 2010 the parties are scheduled to meet with an experienced mediator in order to assist them in resolving the outstanding issues relating to the terms of a new agreement. In the circumstances, I am prepared to suspend Order No. 1 on an interim basis in order to ensure that the workplace inspections are reinstituted in the very near future. However, at this time I am only prepared to suspend that order until the end of the day on March 17, 2010, two weeks after the scheduled date of the mediation. This suspension will permit the parties to use the mediation as an opportunity to settle the terms of a new agreement. The interim suspension also builds in an extra two weeks to resolve any issues that may remain outstanding at the end of the mediation. The Board will schedule a further conference call consultation with the parties in this proceeding on March 15 or 16, 2010, in order to entertain the submissions of the parties regarding the form of the interim order, if any, which ought to apply beyond March 17, 2010. Should it be determined at that time that no further interim order is appropriate, the interim order will lapse and the terms of Order No. 1 will apply to the parties at that time.

64. Accordingly, pursuant to subsection 61(3.4) of the Act, the Board:

> (a) suspends Order No. 1 issued by Inspector Christopher Callaghan in Field Visit No. 5730666 on November 30, 2009 until 11:59 p.m. on March 17, 2010;
>
> (b) orders that the physical condition of the London campus workplace be inspected by the management and worker members of the London JHSC in accordance with the inspection frequency chart attached by the College at Tab 6 to its Application for Suspension of Inspector's Order filed with the Board in this proceeding; and

> (c) orders that within 10 calendar days of the date of this order the London JHSC agree upon a time schedule for conducting the workplace inspections referred to in paragraph (b), above, failing which the Board will determine such schedule.

These orders will remain in place until March 17, 2010 at 11:59 p.m. If the College and the Locals reach an agreement on an alternate workplace inspection protocol before that time, they can advise the Board and the interim orders set out above will be vacated, or altered, as appropriate.

65. I will remain seized of this suspension proceeding. Should any issues arise from the orders made above, the parties should contact the Registrar.

66. This proceeding is referred to the Registrar to make arrangements for a conference call on March 15 or 16, 2010.

3325-08-ES Glendale Golf and Country Club, Limited, Applicant v. Massimo Sanago and Director of Employment Standards, Responding Parties

Employment Standards – The employer sought review of an order to pay overtime to its former executive chef – The Board found that the employee's work was supervisory or managerial in character so that he would normally be exempt from the overtime provisions of the Act – The Board further determined that the chef's assisting the line cooks during peak hours was irregular or exceptional and did not remove him from the exemption to overtime pay – However, the Board considered, for the first time, the significance of s. 22(9) of the Act, where an employee's time is divided between exempt work and non-exempt work and includes hours that would qualify for overtime pay – The Board held that the chef was entitled to overtime for those weeks where he spent more than 50% of his time performing tasks that were not supervisory or managerial – Application allowed in part

BEFORE: *John D. Lewis*, Vice-Chair.

APPEARANCES: *Scott T. Williams, Frank Lasowski* and *Jason Munro* appeared on behalf of the applicant; *Massimo Sanago, Katie Armitage* and *Jamie Chiang* appeared on behalf of the responding parties.

DECISION OF THE BOARD: January 20, 2010

1. This is an employer application for review pursuant to section 116 of the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended (the "Act").

The Background

2. The Employment Standards Officer (the "ESO") ordered that the respondent, Massimo Sanago ("Sanago"), was entitled to overtime pay and vacation pay associated with the overtime pay in the amount of $10,000.00, pursuant to section 103(4) of the Act.

3. The ESO's Order to Pay states the following:

> The employee, Massimo Sanago, states that he was employed with the above noted employer as a Head Chef from June 15, 2007 to November 30, 2007. The employee states that he worked overtime hours of which he was not paid for. The employee resigned his position on November 30, 2007. There is no dispute the employee worked overtime hours of which he was compensated $5,000.00 for overtime hours worked, however, that sum did not include all wages owed to him.

4. The ESO's Order to Pay also states:

> There is no dispute that the employee was employed to supervise and manage staff including hiring, training and performance management as well as operating within a budget. There is no dispute that during the employee's employment, the employer did not have enough staff to run the kitchen which obligated the employee to perform all functions including the subordinate's functions. The employee was obligated to work overtime hours due to the short staffed situation in order to run the kitchen. Based upon the balance of probabilities and evidence provided the employee performed non-supervisory or non-managerial tasks more than 50% of his time, therefore, I find the employer is in violation of section 22, overtime pay and section 38, vacation pay…

5. The applicant, Glendale Golf and Country Club, Limited (the "Employer" or "Glendale G.C.") takes the position that the job of Executive Chef is exempt from the overtime provisions of the Act as the position is supervisory or managerial in character.

6. The Employer relies upon subsection 8(b) of Ontario Regulation 285/01 of the Act ("O. Reg 285/01"), as amended, which states:

> s.8 Part VIII of the Act does not apply to,
> (b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis.

7. The Ministry of Labour, on behalf of the Director of Employment Standards (the "Ministry"), does not dispute that the position of Executive Chef was intended to be supervisory or managerial in character. However, the Ministry takes the position that the O. Reg 285/01, subsection 8(b) exemption is not applicable to Sanago as he performed non-supervisory or non-managerial tasks on a regular or non-exceptional basis.

The Evidence

8. Glendale G.C. called Mr. Jason Munro ("Munro"), the Office Manager, as its only witness. In his capacity as Office Manager, Munro oversees Glendale G.C.'s finances, accounting and benefits. The vast majority of his testimony was not the subject of dispute by the Ministry or Sanago.

9. The Job Description of Executive Chef was tendered into evidence. The job purpose of the Executive Chef was to supervise and administer all phases of kitchen operations including food selection and purchase as well as the supervision of subordinates and coordination of the kitchen service with other departments.

10. The Job Description lists specific responsibilities the most notable and relevant being the following:

> 1. Supervise food preparation, cost quality, quantity inventories, ... plan monthly kitchen budget.
> 2. Establish and supervise job methods and cooking standards to maintain a high quality of food service.
> 5. Interview and hire applicants for employment; responsible for training program and proper placement of employees; set up work schedules and job requirements.
> 6. Prepare inventories and may revise work schedules for each week; report on daily payrolls, overtime, absenteeism and accidents.
> 8. Assist line cooks during peak hours.

11. Concerning point #8 of the Job Description listed above, Munro testified that Sanago's role was supposed to be 100% supervisory as it related to the kitchen and that there was no expectation that Sanago would be doing line cooking work.

12. Munro testified that Sanago reported to the General Manager of the Glendale G.C., The General Manager reported to the Board of Directors. The position of Executive Chef was a salaried position and received benefits and a bonus based on a percentage of food costs unlike the kitchen staff who were paid hourly and did not receive benefits or bonuses.

13. During his employment Sanago typically had eight to twelve kitchen staff (ie. Sous Chef, Line Cooks, Dishwashers), which he supervised. Sanago had authority over work schedules, hours of work, approval of overtime, assessing of performance, the setting of pay levels, training, hiring, firing, employee absences, accidents, illness, and the granting of time off from work.

14. Sanago, as the Executive Chef, supervised all phases of the kitchen operation and was responsible for a budget of approximately $700,000.00 on both the revenue and expense side. He was responsible for selecting Glendale G.C.'s food providers and planning the menu for the Club. Sanago participated in monthly management meetings in which all department heads met with the General Manager just prior to the General Manager meeting with the Club's Board of Directors.

15. Sanago commenced his employment as Executive Chef in mid-June. Within two weeks of commencing his position, due to a combination of employee quits and terminations for not meeting Sanago's standards, he had lost five (5) kitchen staff, including the Sous Chef and at least one Line Cook. While Sanago placed ads in newspapers and otherwise tried to fill the numerous staff vacancies, the short-handed situation in the kitchen lasted approximately two (2) months until he was able to bring it back under control. The fact that the short-staffed situation occurred, at what could be characterized as the peak part of the season for hospitality-related employers, made it difficult for Sanago to find and hire the employees he had lost in the kitchen. During this period Sanago was typically working seven (7) days a week, 12-16 hours a day. Many of these hours involved Sanago performing the non-supervisory/non-managerial duties of line cooking.

16. Even though Sanago was viewed by Glendale G.C. to be managerial, and hence not entitled to overtime, the Club in recognition for the hard work, long hours/overtime Sanago had performed during this time, authorized Munro to make a gratuitous payment to him in the amount of $5,000.00. As indicated previously, at paragraph 3 of this decision, the Order to Pay acknowledges this payment as being given to Sanago for overtime hours worked.

17. In cross-examination, Munro was asked to review Sanago's written offer of employment letter and explain what was intended by the sentence in the letter that read, "you may be called upon to meet the day to day business trends of the Glendale kitchen." Munro indicated the sentence was referring to the fact that Glendale G.C. has certain events and when these events are taking place the Executive Chef is responsible to make sure things run smoothly.

18. Also in cross-examination, Munro was asked about point #8 of the Job Description (ie. "assist line cooks during peak hours"). Once again, Munro testified there was no expectation that Sanago would be working performing line cooking but he did admit that when so many staff had left Sanago became obligated.

19. Sanago also testified and confirmed much of the testimony of Munro. Sanago indicated that it was very hard to hire new hospitality staff once the vacancies in late June occurred. Sanago testified he tried diligently to replace people so that he wouldn't have to be on the line cooking. Sanago indicated it took a good number of weeks before he could get his hours under control but that after the week of July 28th his overtime hours dropped significantly.

20. Sanago testified that during the period when he was having to fill in and perform the line cooking, more than 55% of his total time was spent cooking on the line, with the remainder of his hours being devoted to performing his managerial duties of Executive Chef. In cross-examination, Sanago confirmed that the line cooking was performed as his overtime hours and not part of his core forty-four (44) hours. Sanago also testified that the office staff had suggested he write down the hours he worked on a calendar. The hours reported on Sanago's calendar formed the basis for the ESO's determination of the hours worked during Sanago's employment.

21. In cross-examination, Sanago also admitted that while cooking on the line he used some of that time as an opportunity to conduct general supervision and assessment of the kitchen staff.

Analysis and Conclusions

22. The employer cited and relied upon the following cases: *Westminster Trails Golf Club* [2002] O.E.S.A.D. No. 428, 2002 CanLII 29975 (ONLRB) (July 17, 2002); *Evans v. Lakehead University Student Union*, 2006 CanLII 19012 (ONLRB) (June 5, 2006); *Kennedy v. William C. Cavell Enterprises Ltd.* [1987] O.J. No. 1050, 18 C.C.E.L. 52 (Ont. Div. Ct.) (November 27, 1987); and *Bowes v. Code's Mill on the Park*, 2004 CanLII 16732 (ONLRB) (April 27, 2004). In addition, the Employer referred to the definitions for the words "exceptional" and "irregular" as found in the Shorter Oxford English Dictionary, Sixth Edition.

23. The Ministry cited and relied upon the following cases: *1151257 Ontario Inc. (c.o.b. Sign Design)* [2003] O.E.S.A.D. No. 1338 (December 11, 2003); *Thermo Coustics Ltd.*, [2007] O.E.S.A.D. No. 582 (June 20, 2007); *TriRoc Electric Ltd.* [2003] OLRB Rep. Jan./Feb. 146 (February 18, 2003).

The Ministry also referenced the Employment Standards Act 2000: Policy and Interpretation Manual pp. 31-20.2 to 31-22 (the "ESA Policy Manual").

24. The above authorities relied upon by the parties involve cases, some of which were decided based on the current overtime exemption language in the Act and some of which were decided under the predecessor exemption language.

25. The overtime exemption provisions of both the current and former Act were reviewed at paragraph 2 of the *Bowes* decision, supra, as follows:

> The Act came into force effect on September 4, 2001 and the basis for the exclusion of "managers and supervisors" from the overtime provisions also changed. Prior to September 4, 2001, section 6 of Regulation 285 ("former provision") excluded those "whose only work is supervisory or managerial in character". After September 4, 2001, subsection 8(b) of Regulation 285 ("current provision") excluded those "whose work is supervisory or managerial in character and who perform non-supervisory or non-managerial tasks on an irregular basis".

26. The Board, in the *Bowes* decision at paragraphs 3 and 4, also made the following comments:

> 3. ...the amendment set out above required the application of a new test for the bulk of the period claimed...The Board's decision in *Tri Roc Electric Ltd.* [2003] O.E.S.A.D. No. 1002 establishes that the clear implication of subsection 8(b) is that the regular performance of non-managerial function duties in the ordinary course of an employee's work renders the exemption inapplicable.
>
> 4. ...Under the former provision, it was possible that a manager who did the same work as those they supervised or managed could nevertheless be excluded if the "overall character of the work" was supervisory or managerial. This "character" could be established if the work included direction over the allocation of time and work, supervision of the quality and quantity of work of others and other powers or discretion associated with managerial functions.

27. As the current exemption still contains some of the key elements from the former exemption, the Board is of the view that the prior jurisprudence involving the former exemption still remains useful as it concerns the assessment and the determination as to whether a particular position is managerial or supervisory in "character". However, if the position is determined to be managerial or supervisory in "character", the clear language of the new exemption requires an additional inquiry. In particular, if the position is managerial or supervisory in character and the individual in that position performs non-supervisory or non-managerial tasks, one must assess whether these tasks are done on an irregular or exceptional basis.

28. Therefore, the first questions that have to be answered in this matter in order to establish if Sanago falls within the overtime exemption are:

> (1) was Sanago's work managerial or supervisory in character; and if so,

> (2) did he perform non-supervisory or non-managerial tasks on an irregular or exceptional basis?

Was the Work Managerial or Supervisory in Character?

29. In the *Westminster Trails Golf Club* decision, *supra*, the Board decided that a Food and Beverage Supervisor at a golf course, even though she did a substantial amount of work that was not managerial, was still a person whose only work was supervisory or managerial in character (the former exemption). At paragraph 17 of the decision, the Board commented as follows:

> In this case, Ms. Phillips hired, trained and scheduled up to ten staff people, she was responsible for the running of the food and beverage part of the operation, she dealt with suppliers, ordered food ensured cash flow. Most importantly, she organized and prioritized the work. All of these are within the character of what is managerial work. It may well be that there was too much work to be done and expected of her and that she ended up doing more non-supervisory work than should have been the case. But she had authority to and controlled the food services of the golf club. The fundamental character of her work is managerial.

30. Page 31-21 of the ESA Policy Manual comments that the new overtime exemption language…"was intended to clarify that the managerial exemptions can apply even if the individual is not *exclusively* performing managerial or supervisory work".

31. In this matter, the Board finds that the fundamental character of the Executive Chef's position at Glendale G.C. was managerial and/or supervisory. The evidence of Sanago's duties, as outlined in paragraphs 9 though 14 of this decision, clearly indicate that the fundamental character of the Executive Chef position is managerial and/or supervisory. The realities of a short-staffed kitchen obligated Sanago to perform line cooking for a period of time. His job duties required him to perform both managerial/supervisory and non-managerial/non-supervisory work. However, the Board finds that the performance of line cooking, in the given circumstances, did not alter the essential "character" of the Executive Chef position. The essential character of the position remained managerial/supervisory.

32. The Executive Chef position has many of the traditional managerial/supervisory indicia (ie. ability to hire, fire or otherwise affect the working lives of others, etc.), which the Board traditionally looks to support a managerial/supervisory determination. As was the result in *Westminster Trail Golf Club, supra*, the fact that Sanago was obligated to perform some non-managerial/non-supervisory tasks does not negatively impact the position so as to change its "character". The Executive Chef position remains, in character, a managerial/supervisory position.

33. However, it should be noted that the Board's determination as to the "character" of the Executive Chef's position does not end the matter. The Board must now, pursuant to the language of the new exemption, also inquire as to whether the Executive Chef performed non-supervisory or non-managerial tasks, and if so, did he perform these tasks on an irregular or exceptional basis.

Did the Executive Chef perform non-supervisory or non-managerial tasks on an irregular or exceptional basis?

34. It is clear that point #8 of the Job Description for the Executive Chef position anticipates that one of the responsibilities of the job may be to assist line cooks during peak hours. Assisting line cooks may very well involve helping out in the kitchen by actually performing cooking duties, and as such, would be non-managerial and/or non-supervisory work. While Munro's evidence indicated there was no expectation that Sanago would be doing line cooking work and that the job was supposed to be 100% supervisory, the language used in the Job Description and the events that unfolded suggest otherwise. As a result, the Board finds that Sanago is a person whose work is supervisory or managerial in character and who may be required to perform non-supervisory or non-managerial tasks. The evidence discloses that the employer was aware that Sanago was performing line cooking duties. In this regard, the Board finds subsection 6(1)(a)(i) of O. Reg. 285/01 to be applicable and that Glendale G.C. permitted or suffered non-managerial/non-supervisory work to be done by Sanago.

35. Subsection 6(1)(a)(i) of O. Reg. 285/01 states:

> 6. (1) When work deemed to be performed.–Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,
>
> (a) when work is,
> (i) permitted or suffered to be done by the employer, or…

By operation of subsection 6(1)(a)(i), the non-managerial/non-supervisory tasks performed by Sanago are deemed to be performed for the Employer.

36. While the Board has found Sanago to be a person whose work is supervisory or managerial in character and who was required to perform non-supervisory or non-managerial tasks, the Board must now determine if these non-managerial/non-supervisory tasks were performed on an irregular or exceptional basis.

37. In its legal argument, the Employer provided dictionary definitions from the Shorter Oxford English Dictionary, Sixth Edition as follows:

> exceptional: of the nature of or forming an exception; unusual, out of the ordinary; special; (of a person) usually good, able, etc.
>
> irregular: 4. Not uniform in continuance, occurrence, or succession; occurring at unequal rates or intervals. Also, of an agent: doing something at irregular intervals.

38. The ESA Policy Manual states the following at page 31-21;

> "Exceptional" suggests that non-supervisory or non-managerial duties may be performed so long as they are being performed outside of the ordinary course of the employee's duties. That is, their performance is not in the normal course. For example, if, as a result of a severe snowstorm, the manager were there to assist a staff member to clear the snow from the

> entrance to the employer's establishment (ordinarily the responsibility of the staff member), the performance if this non-supervisory duty could be considered exceptional.

39. The ESA Policy Manual also states the following at page 31-22 as it concerns the term "irregular":

> "Irregular" implies that although the performance of non-supervisory or non-managerial duties is not unusual or unexpected, their performance is unscheduled or sporadic (ie. does not occur at a regular or set time). For example, if a manager is expected or required to cover staff duties for non-supervisory staff as a result of an unexpected rush of customers, or because a non-supervisory employee has called in sick, these duties may be considered "irregular" because they are not performed at a scheduled or otherwise regular time. However, if a pattern developed with the result, for example, that a manager was performing staff duties everyday during the lunch rush between 11:30 a.m. and 1:00 p.m., the Program's position would be that the performance of these duties were clearly no longer "irregular.
>
> ...Whether the performance of non-supervisory or non-managerial duties on a daily basis is "irregular" may also depend not only on whether or not they are "scheduled", but also the frequency with which such duties are performed and the amount of time spent performing them.

40. The ESA Policy Manual is not binding on the Board. It acts merely as a guideline. This being said, the Board does find the comments made in the ESA Policy Manual of assistance in assessing whether the non-managerial/non-supervisory duties performed by Sanago can be characterized as either "irregular" or "exceptional".

41. What is the impact, if any, of point #8 of the Job Description as to the determination of "irregular" or "exceptional". Once again, point #8 indicates that one of the non-managerial/non-supervisory duties of the Executive Chef position is to assist line cooks during peak hours. However, there is no evidence as to when peak hours occur, their frequency, the amount of time that might be involved in assisting. There is no evidence that such assistance would occur in such a way so as to develop into a pattern. The only evidence, which was uncontradicted, was that of the Office Manager who testified that regardless of the language in point #8 of the Job Description the intention was to have the Executive Chef position 100% supervisory with no line cooking involved. In this regard, the Board finds that the language of the job description does not assist the Board in determining whether line cooking duties were to be irregular or not. The evidence of Munro, on the other hand, suggests that line cooking duties, given they were not intended to occur, would be the exception and not the rule, and hence irregular.

42. Whatever the Employer may have intended for the Executive Chef position, it is clear that events overtook that intention. The evidence discloses that for approximately two (2) months the Executive Chef performed non-supervisory/non-managerial duties (ie. line cooking), to such an extent that usually 55% of all hours worked during this period was time spent performing line cooking. Once again, the Board notes that in cross-examination, Sanago agreed that after the week of July 28th his overtime hours dropped significantly.

43. The Board finds that the significant quits/firings of the kitchen staff, which occurred at the commencement of Sanago's employment, placed the Executive Chef in such a position that he had no alternative but to regularly perform the day-to-day duties of non-supervisory/non-managerial employees in order to keep the kitchen operational. The fact that the Employer may or may not have expressly assigned Sanago this work is irrelevant. The Employer was aware Sanago was performing such work. The Employer's knowledge in this regard is further evidenced by the fact that the Employer provided Sanago with a gratuitous payment for the long hours and overtime he had worked.

44. In *Bowes, supra*, the Board found a Manager to properly fall within subsection 8(b) exemption even though she performed "hands-on" activities when the employer was understaffed. At paragraph 13 of the *Bowes* decision the Board noted "[N]othing in her evidence indicated that these occasions were 'regular'". In this regard, *Bowes* is distinguishable from the present facts where understaffing for a period of time was a daily occurrence.

45. The Board finds that the frequency and duration of the non-supervisory duties performed by Sanago resulted in a pattern developing which necessitated the Executive Chef performing non-supervisory duties on a basis that can not be characterized as "irregular".

46. However, the above determination that the non-managerial/non-supervisory duties were not irregular in nature does not necessarily mean or dictate that such duties must also be determined to be non-exceptional.

47. The use of the disjunctive word "or" in subsection 8(b) indicates the Legislature intended the new overtime exemption to be available to a managerial/supervisory employee who performs non-supervisory tasks on either a) an irregular basis or b) an exceptional basis. As such, the Board must also determine whether the non-supervisory duties performed by the Executive Chef were performed on an "exceptional" basis.

48. The dictionary definition of "exceptional", as well as the ESA Policy Manual, refer to the term "exceptional" as involving something "out of the ordinary". In this regard, the Board finds that the quit/firings, involving approximately 50% of the kitchen staff Sanago was to supervise, at a time in the hospitality season that makes their replacement very difficult, to be "out of the ordinary" circumstances and hence "exceptional" events. It is not improper to characterize the events which unfolded at the commencement of Sanago's employment as triggering a crisis in the Glendale G.C. kitchen. This crisis in the kitchen necessitated and obligated the Executive Chef to perform non-supervisory duties.

49. There is no doubt that the duration Sanago performed non-supervisory tasks, (ie. approximately two months), is not insignificant. In some circumstances, the fact that a certain state of events lasts for two months may very well be a key factor in determining whether a particular state of events can be properly characterized as "exceptional" due to the passage of time involved.

50. In the present circumstances, the Board finds that the duration resulted in a regular daily pattern developing. However, that regular pattern can trace its origin back to the "out of the ordinary" events that took place in the kitchen. The fact that the duration of the crisis lasted for approximately two months is consistent with a finding that exceptional events did occur. Therefore, the Board finds the duration of the crisis (ie. approximately two months), before the situation was brought under control and a state of normalcy returned, does not militate against a finding of "exceptional". The

Board finds that the events that created the crisis proportionally contributed to the depth and breadth of the crisis and hence the length of time it took before the crisis was resolved. The Board finds the events which necessitated the Executive Chef performing non-managerial/non-supervisory duties, to be "out of the ordinary" be properly characterized as "exceptional".

51. Based upon the above findings and determinations, the Board further finds that the overtime exemption contained in subsection 8(b) of O. Reg. 285/01 to be applicable in this matter. As such, the Executive Chef, Sanago, is found to be a person whose work is supervisory or managerial in character and who performed non-supervisory or non-managerial tasks on an exceptional basis.

52. Normally, the above finding would be determinative of the matter. However, there is another section of the Act, namely section 22(9), that the Board finds relevant to the ultimate determination of this matter.

Section 22 (9) of the Act

53. Section 22(9) of the Act states as follows:

> **22.** (9) If an employee who performs work of a particular kind or character is exempted from the application of this section by the regulations or the regulations prescribe an overtime threshold of other than 44 hours for an employee who performs such work, and the duties of an employee's position require him or her to perform both that work and work of another kind or character, this Part shall apply to the employee in respect of all work performed by him or her in a work week unless the time spent by the employee performing that other work constitutes less than half the time that the employee spent fulfilling the duties of his or her position in that work week.

54. Section 22(9) is found in Part VIII – the Overtime Pay sections of the Act. A review of the express language of section 22(9) indicates that an employee who performs work of a particular kind of character (ie. managerial/supervisor) that is exempted from the application of this section by the Regulations (ie. s.8(b), Ont. Reg. 285/01), and the duties of the employee's position require him or her to perform both the exempted work and work of another kind or character, this Part (Part VIII – Overtime Pay) shall apply to the employee in respect of all work performed in a work week unless the time spent performing that other work constitutes less than half the time that the employee spent fulfilling the duties of his position in that work week (emphasis added).

55. In this particular matter, the Board has determined that the Executive Chef falls within the subsection 8(b) exemption, and that, the Executive Chef was a person whose work was supervisory or managerial in character and who performed non-supervisory or non-managerial tasks on an exceptional basis. However, the evidence also discloses that while Sanago's position was managerial/supervisory in character, there were work weeks, due to the crisis in the kitchen, where his position required him to perform both the exempted work and work of another kind of character (ie. the line cooking). In a number of these weeks, the evidence discloses that the time spent performing the other work (ie. line cooking) was more than half the time that Sanago spent fulfilling the duties of his position in that work week.

56. In particular, the evidence of Sanago, as well as the documentary evidence of Sanago's calendar entries, summary of hours and the ESO's worksheets, indicate that during the approximately two (2) month period in which Sanago was dealing with the crisis in the kitchen, there were many weeks when his hours worked on line cooking exceeded the time spent on his "exempted" managerial/supervisory duties.

57. Sanago's evidence was that during the short-staffed period more than 55% of his total work time was spent on the line. In cross-examination, Sanago did admit that while on the line he also used that time as an opportunity for training, assigning work, general supervision and assessment of employees, however, there was no evidence as to how much time was spend on these activities and how that time may have impacted the more than 55% figure he had testified to. Therefore, the Board is left with the 55% figure remaining relatively unchallenged.

58. In cross-examination, Sanago testified that the overtime hours he incurred were all line cooking hours. Lastly, Sanago's own evidence was that it took a good number of weeks to get his hours under control so that he would not be on the line. He testified that after the week of July 28th his overtime hours dropped significantly. The Board notes there is no direct evidence pertaining to any week, after the week of July 28th , that provides any explanation for subsequent overtime hours being incurred and whether such hours pertain to managerial/supervisory duties or non-managerial tasks. In light of Sanago's own evidence that his overtime hours significantly dropped off after July 28th and the fact that he did not provide any further evidence as to the work performed subsequent to the week of July 28th, the Board finds it appropriate to infer that such overtime hours do not relate to non-managerial/supervisory tasks.

59. The Board provided the parties with an opportunity to provide submissions with respect to the applicability of section 22(9) of the Act. Both the Employer and the Ministry, for different reasons, take the position that section 22(9) of the Act is not applicable. The Employer's rationale is that the position of Executive Chef is 100% supervisory and/or managerial in kind or character, and as such, Sanago was not requested to perform duties of another kind or character. In this regard, the Employer relies upon the decision in *Ideal Parking Inc.*, [1999] O.E.S.A.D. No. 58 and the approach taken by the adjudicator which characterized the individual's work in that decision as managerial/supervisory in character even though the individual was performing some of the front line work of a parking attendant. The Board notes the decision in *Ideal Parking Inc., supra,* involved the former overtime exemption and was decided prior to section 22(9) being incorporated into the Act and, therefore, is of little assistance to the Board in this case.

60. In the alternative, the Employer submits that if the Board finds that the line cooking work Sanago performed was non-managerial/non-supervisory in kind or character, then Sanago performed such work as part of his overtime hours and not during the core 44 hours per week. As a result, only the weeks of June 23, 30, July 7, 14 and 28 exceed the core 44 hours and would therefore be above the 50% threshold set out in section 22(9) of the Act. In addition, in the alternative, to the extent the ESO found that the $5,000 payment provided by the Employer to Sanago should be deducted as an amount paid to recognize excess hours of work (albeit on a gratuitous basis), such sum should again be deducted from any overtime amount the Board may find overtime owing.

61. The Ministry takes the position that section 22(9) of the Act is not applicable and states in its submissions the following:

> The purpose of section 22(9) is to ensure that employees who perform both work that is exempt from the overtime provisions, and work that is not exempt, are entitled to overtime pay for all hours worked in excess of the overtime threshold, as long as at least fifty prevent of their work week is spent performing non-exempt work. The example provide on the Ministry of Labour's online Guide to the Employment Standards Act, is of an employee who works for a taxi company both as a cab driver and as a dispatcher in the company's office. Working as a cab driver the employee is exempt from overtime, but working in the office as a dispatcher, the employee is not. If the employee works more than 50% of his or her work week as a dispatcher, he or she is entitled to overtime pay for all hours worked in excess of the overtime threshold.

62. The Ministry submits that section 22(9) of the Act is not applicable on the basis that the Executive Chef position does not qualify for the overtime exemption, hence there is no work being performed that is exempt from Part VIII of the Act. However, the Board has found otherwise and has determined that the Executive Chef position is exempt as the position is managerial/supervisory in character and that non-managerial/non-supervisory tasks were performed on an exceptional basis.

63. The Board is of the view that the example cited by the Ministry in its online "Guide to Employment Standards Act", as it concerns an employee who works as both a cab driver and dispatcher, is analogous to the present scenario involving the Executive Chef. Just like the position of cab driver (see O. Reg. 285/01 s.8(j)), there are many jobs that are exempt from the overtime provisions of the Act (see O. Reg. 285/01, sec. 8). One of the many exempted jobs identified in section 8 of O. Reg. 285/01 are jobs held by persons whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis.

64. A managerial/supervisory job can qualify for the exemption from overtime if the job falls within the language of the exemption contained in subsection 8(b) of Ont. Reg. 285/01 of the Act. The express language of subsection 8(b) of the Regulation contemplates that the managerial/supervisory exemption may be applicable even if the individual is not exclusively performing managerial or supervisory work. The Ministry's own guidelines, as outlined in its ESA Policy Manual (31-21) supports such an interpretation. Therefore, the Board sees no reason why it should distinguish or otherwise treat differently the overtime exemption for a managerial/supervisory person from the overtime exemption applicable to other exempt jobs such as a cab driver, firefighter, ambulance driver, etc.

65. The Board finds there is no basis, statutory or otherwise, for treating the managerial/supervisory overtime exemption in a different manner from other jobs exempted by subsection 8 of O. Reg. 285/01 in its application to section 22(9) of the Act. There is no basis to support an interpretation that would exclude the managerial/supervisory exemption from s. 22(9) of the Act.

66. If a particular job falls within the managerial/supervisory exemption and the duties of that employee's job require him or her to perform the exempted work and work of another kind or character, the clear wording of section 22(9) of the Act states that Part VIII of the Act applies and the

employee is entitled to overtime performed in a work week, so long as the non-exempt work in that work week constitutes 50% or more of the time the employee spent working.

67. If an employee in a position that qualifies for the managerial/supervisory exemption but who also spends 50% or more of his time during a work week performing work of another kind or character, such that the non-exempt tasks do not alter the "character" of the position (ie. the non-exempt work is done on a "irregular" or "exceptional" basis) then the Board sees no reason why section 22(9) of the Act should not apply.

68. The Board is unaware of any prior decisions that have interpreted section 22(9) of the Act. While the parties provided written submissions as to the applicability of section 22(9) of the Act, no party cited any prior jurisprudence in which section 22(9) of the Act had been considered.

69. An interpretation of section 22(9) of the Act which results in overtime being paid to an employee, in a exempted position, when circumstances are such that the employee performed non-exempt work for 50% or more of the time spent working during a particular work week, is an interpretation that is consistent with the well-accepted principle that limiting or exempting provisions in remedial legislation are to be narrowly construed. It is also an interpretation that gives effect to the plain language used in section 22(9) of the Act.

70. An interpretation of section 22(9) of the Act that allows overtime to be paid to an employee in a managerial/supervisory position, who due to irregular or exceptional circumstances finds themselves in a situation where the duties of their position require him or her to perform both exempt work and non-exempt work, to such an extent that the non-exempt work is 50% or more of the time spent working during that work week, is analogous to the cab driver/dispatcher scenario referenced by the Ministry in its online Guide to the Act.

71. Therefore, the Board finds section 22(9) of the Act applicable to the unique facts of this case. The Board sees no reason why, a managerial/supervisory employee (whose duties require him or her to perform both exempt and non-exempt work), should not receive overtime pay in respect of all of the overtime work performed in a work week when irregular or exceptional circumstances result in 50% or more of that employee's working time being devoted to performing the non-exempt duties.

72. The evidence discloses that there were five weeks when Sanago's overtime hours, which the Board has determined all involved line cooking, exceeded his managerial/supervisory duties. Those weeks are as follows:

Week	**Regular Hours**	**Overtime Hours**
June 23rd	44.0 hours	53.5 hours
June 30th	44.0 hours	59.0 hours

July 7th	44.0 hours	60.0 hours
July 14th	44.0 hours	50.5 hours
July 28th	44.0 hours	54.0 hours

73. Based on the ESO's calculations, the Board has determined that overtime pay, and the associated vacation pay on the applicable overtime pay for the weeks of June 23, 30, July 7, 14 and 28th comes to a total of $9,443.22. It is clear that while characterized as a gratuitous payment, the $5,000.00 payment made to Sanago was intended to serve as compensation for the excess overtime hours the Employer knew Sanago had performed due to the crisis in the kitchen. The ESO, in her Order to Pay, also characterized this gratuitous payment was for overtime hours worked and deducted the $5,000.00 from the total amount of overtime initially found as owing.

74. In *Netcor Communications International Inc.*, [2008] O.E.S.A.D. No. 1020 (November 20, 2008), the Board found that a gratuitous payment was intended to serve as termination pay. As a result, the Board applied the gratuitous payment made in that case against the total termination and vacation pay amount found to be owing. As was the result in *Netcor Communications International Inc.*, the Board finds it appropriate in this matter to take into account the $5,000.00 payment already made to Sanago, even though it was characterized as a gratuitous payment. It was the ESO's initial determination, and the Board concurs with that determination, that the $5,000.00 payment was intended to serve as compensation for overtime hours.

75. The Director of Employment Standards is ordered to pay the claimant forthwith from the monies held in trust the amount of $4,443.22 and to retain the statutory administration fee therein. The balance of the monies held in trust is to be remitted forthwith to the applicant.

76. This application for review is allowed in part as set out above.

1459-09-R United Food and Commercial Workers International Union (UFCW Canada), Applicant v. **Hudson's Bay Company**, Responding Party

Bargaining Unit – Certification – Status – This application raised two issues: whether the Union's proposed bargaining unit improperly excluded five yard dispatchers; and whether S and B were employees at the time of the vote – The Board noted that the Union's proposed bargaining unit need not be the best possible, but its configuration should be viable without causing serious labour relations problems – There were several considerations: the dispatchers would be the only full-time employees in the distribution centre not represented; they had little prospect of attracting a trade union; there would be fewer work opportunities for bargaining unit members because many of the dispatchers were sourced from bargaining unit positions; it

was a condition of employment that bargaining unit employees cover the dispatcher positions; and a dispatcher position was a logical placement for employees with physical restrictions and/or who were in need of accommodation due to disability – The Board held that the Union's proposed exclusion of the yard dispatchers created undue fragmentation – As for the two remaining disputed employees, the Board determined that S, on maternity leave of finite duration with a statutorily protected right to return to her position, was an employee at the time of the vote, but B, away from the workplace, earning no wages, for almost twenty months, was not – B's continued group benefit coverage and employee discount were not evidence of a substantial connection to the workplace – Ballots to be counted in accordance with Board decision

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *John R. Evans, Neil Keating, Kevin Shimmin, Sarah Neath* and *Winston Gordon* for the applicant; *Wallace Kenny, Rick Hibbard, Lina Barbosa, Susan Reid, Paul Kahlon* and *Leo Dubrevil* for the responding party.

DECISION OF THE BOARD: January 6, 2010

1. This is an application for certification under the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended ("the Act") in respect of certain employees of the responding party ("the company" or "HBC") working at a distribution centre in Toronto.

Background

2. A representation vote was held in this matter on August 28, 2009. Forty-six of the counted ballots were in favour of the applicant and forty-one were against. Ten ballots were segregated and not counted. Five of the ten segregated ballots were cast by Yard Dispatchers. The applicant's proposed bargaining unit does not include Yard Dispatchers. The company contends that a bargaining unit excluding the Yard Dispatchers is not appropriate. It therefore proposes their inclusion in the bargaining unit, with the effect that their ballots would be counted.

3. The other five segregated ballots were challenged by the applicant ("the union"). By the time the hearing concluded, the union had withdrawn three of those challenges (and therefore those ballots will be counted in due course), but maintained its opposition to the counting of the ballots cast by Sandeep Sidhu and Michael Bailey. The union says Ms. Sidhu was not an employee on the date of the application for certification, and it contends that Mr. Bailey had no reasonable expectation of a return to work, and no significant connection to the workplace. HBC's position is that Mr. Bailey and Ms. Sidhu were employees on the date of application, were entitled to vote, and to have their ballots counted.

4. On the suggestion of counsel for HBC, and with the agreement of counsel for the union, this matter proceeded by way of a consultation on December 7 and 8, 2009. Most of the factual record was determined through a process by which counsel for HBC set out the company's allegations and documentary records, and counsel for the union responded by indicating the extent, if any, to which the union was in agreement or did not dispute those allegations and documents. In addition, counsel for the union also stipulated certain facts to which counsel for the company responded in much the same fashion, indicating where the company agreed or did not dispute the

union's allegations. Finally, Ms. Sidhu testified briefly, at the request of the union. The findings of fact are based upon the combination of Ms. Sidhu's evidence and the parties' undisputed material allegations and documents.

5. In passing, I note that, according to counsel for HBC, the company served Mr. Bailey with a summons to appear at the hearing. Mr. Bailey, however, did not attend.

The Facts

i. The Yard Dispatchers

6. The sole difference between the parties concerning the bargaining unit description is whether or not the Yard Dispatchers ought to be included or excluded. The only individuals employed by the company (as opposed to third party contractors) who are not in the bargaining unit are the management, two office employees - one in Human Resources, the other an Executive Assistant to a manager - and seasonal/casual employees who are hired for temporary periods throughout the year. Although the union initially resisted including in the bargaining unit Quality Acceptance/Loss Prevention employees, they too are in the bargaining unit on the agreement of the parties. The Yard Dispatchers report to the same supervisor, and are in the same department, as the Quality Acceptance/Loss Prevention people.

7. There are five Yard Dispatchers who normally operate the gatehouse to the facility. The Yard Dispatchers are responsible for coordinating the shunt movements to and from the doors and controlling the incoming and outgoing trailers from vendors, stores and other distribution centres. This involves regular communication with receiving and shipping departments and central dispatch to insure the smooth, effective flow of trailers.

8. The five Yard Dispatchers are: Dragan Tepavcevic, Kamal Mustafa, Robert Neale, Don Nicholls and Manmeet Chhabra.

9. The Yard Dispatchers are the only employees of the company who regularly work in the yard. Truck drivers are not company employees.

10. The position of Yard Dispatcher is not as physically demanding as other jobs associated with Shipping and Receiving as incumbents are not lifting or moving cartons. Accordingly, The Yard Dispatcher job has been used as a "light duty" job to accommodate the return to work of other employees in the Distribution Centre. Mr. Nicholls, one of the incumbents, began work as a Material Handler (in the bargaining unit) in 1989. He then became a Warehouse Receiver Lead Hand (in the bargaining unit). As a result of injuries he was assigned to the Yard Dispatcher job function. This assignment became permanent.

11. Of the remaining four Yard Dispatchers, Mr. Tepavcevic was previously a Material Handler; Ms. Mustafa was previously employed in a general clerical position in the bargaining unit; Mr. Neale was hired into the Yard Dispatcher position "off the street"; and Ms. Chhabra transferred into the Yard Dispatcher position from another of the company's distribution centres.

12. Eric Hennings, a Yard Dispatcher since 1992, transferred to a Material Handler position in 2001.

13. The company has a policy on overtime. It contemplates employees from a different classification doing overtime work in another classification in the event there are no employees in the classification required to work the overtime, so long as they possess the skills and abilities to perform the overtime. On August 15, 2009, Mr. Tepavcevic, one of the five Yard Dispatchers worked overtime in his old position of Material Handler (bargaining unit position).

14. Some, if not all, of the Quality Assurance/Loss Prevention personnel, who are in the bargaining unit, as part of their duties are expected to relieve the Yard Dispatchers in the Gatehouse during times when these employees are on vacation or ill. This responsibility is included in the job description for the Quality Assurance/Loss Prevention employees, and such relief occurs as required. For example, Courtney Brown and Zulika Yusuf, both bargaining unit employees, have worked in the Gatehouse as Yard Dispatchers at various times in 2009.

15. The Yard Dispatchers are paid $21.51, the same wage scale as Material Handlers who are in the bargaining unit.

16. The Yard Dispatchers enjoy common Health and Welfare benefits with the bargaining unit employees.

ii. Michael Bailey

17. Michael Bailey has been employed with the company since 1993. His most recent position was Material Handler in the Shipping Department.

18. In January 2008, he was involved in a car accident and has been off work since then and not been paid any wages. Throughout the period of his absence he has continued to receive group benefits, but not long-term disability benefits, which were denied him because he failed to provide the necessary documentation. He may be receiving disability benefits through his own insurer. He has in his possession a company discount card, and is entitled to use it to obtain discounts on purchases of company merchandise.

19. The company continues to monitor Mr. Bailey's absence and inquire as to his return to work status. He is categorized as being on an unpaid leave of absence. Mr. Bailey has provided to the company a couple of doctor's notes, and it appears from them that he suffers from severe chronic pain. He wrote to the company on or about September 15, 2009, well after he voted, indicating that he was still seeking medical attention, and intended to return to work when stable and healthy.

20. Two of the union's witnesses would be in a position to testify that they attended a restaurant they believe Mr. Bailey owns, operates and manages. Indeed, they were informed by an individual at the restaurant that this has been the case for the last two years.

21. The union withdrew its initial challenge to Sandra Peixoto, who has been off work even longer than Mr. Bailey due to illness, and who also is not in receipt of long-term disability benefits. Her ballot was counted.

iii. Sandeep Sidhu

22. At the time of the vote Sandeep Sidhu, a Material Processor, was on a maternity leave which commenced in February 2009 and which would normally have expired a year later. On or about May 14, 2009, as a result of a group layoff, the company sent Ms. Sidhu the following letter:

> May 14, 2009
>
> SANDEEP SIDHU
> 20 VILLAGE LAKE CRES
> BRAMPTON, ON
> L6S 6K2
>
> Dear SANDEEP,
>
> Further to our conversation, on May 14, 2009 Hbc announced a Company reorganization. As a result of this decision, your position is being eliminated, effective May 14, 2009.
>
> This letter will advise you that when you are in a position to return to active employment your status will be re-evaluated. Every effort will be made to find a position for you within the organization. In the event that we are unable to match a suitable position for you, appropriate notice and severance arrangements will be made at that time.
>
> In the meantime, should you have any questions regarding your personal situation please contact Susan Reid at 416-798-5762.
>
> Yours truly,
>
> "Peter Winterberg"
> Peter Winterberg
> Senior Building Manager
> Toronto Logistic Centre

23. Other employees in the group affected by the layoff included Material Processors like Ms. Sidhu. Except for Ms. Sidhu and employees on long-term disability, the people in the group were given termination pay and severance pay.

24. Shortly before the representation vote on August 28, 2009, Ms. Sidhu requested from the company a letter confirming her employment for the purpose of securing a mortgage renewal. The company complied with her request, with a letter dated August 27, 2009 confirming her status as "a full-time associate at the Hudson's Bay Company's Toronto Logistics Centre", and further confirming that she was on a maternity leave of absence scheduled to end in February 2010.

25. By handwritten note dated September 2, 2009, Ms. Sidhu requested to return early from her maternity leave, on October 5, 2009. She was prompted to write the note after speaking to Sue Reid and Dana Newhook in Human Resources on the telephone about an early return to work. Ms. Sidhu had heard the company was hiring seasonal employees, and she thought that was a good sign

that maybe there was work for her. Ms. Sidhu's memory about the timing of her telephone call with Ms. Reid and Dana was not very clear. It might have been one or two weeks prior to writing the September 2 note. She could not recall.

26. Ms. Sidhu returned to work on October 5, 2009, to her position as Material Processor. Other Material Processors she knew who had been in the group layoff did not return to work.

Analysis and Conclusions

27. I turn first to the issue concerning the Yard Dispatchers, and specifically, whether the union's proposed bargaining unit, which excludes the Yard Dispatchers, is an appropriate unit for collective bargaining.

28. Subsection 9(1) of the Act reads:

> **9.**(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

29. In making the determination of the appropriateness of an applicant's proposed bargaining unit, I note the well-established principle in the Board's case law that a trade union's proposed bargaining unit need not be the *best* bargaining unit. The question of appropriateness does not involve a contest between an employer and a trade union to find the most suitable bargaining unit configuration for a particular workplace. Even if the employer's proposed bargaining unit makes more sense than the trade union's, that alone is not a reason to find the trade union's unit inappropriate. See, for example, *Compass Group Canada (Beaver) Ltd.*, [2007] O.L.R.D. No. 4655 (November 7, 2007).

30. A trade union's proposed bargaining unit will not be appropriate if it fails to satisfy the following test:

> [D]oes the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.[1]

31. In the instant matter, the union did not seriously suggest that the Yard Dispatchers did not share a sufficiently coherent community of interest with others in the bargaining unit. What is in issue is whether leaving the Yard Dispatchers out of the bargaining unit causes "concrete, demonstrable problems".[2]

32. In my view, the union's proposed exclusion of the Yard Dispatchers creates undue fragmentation of the workplace. Workplace fragmentation has always been, and remains, a concern

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[1] *Hospital for Sick Children*, [1985] OLRB Rep. February 266, at paragraph 23.

[2] *Active Mold Plastic Products Ltd.*, [1994] OLRB Rep. June 617, at paragraph 30

of the Board, and it qualifies as a concrete demonstrable problem: see paragraph 9 of the decision in *Horizon Poultry Products Inc.*, [1998] OLRB Rep. March/April 208. There is no satisfactory labour relations rationale for depriving the Yard Dispatchers of the opportunity to bargain collectively with the co-workers in their department and with other employees outside their department. If the Yard Dispatchers are not included, they will be the only full-time employees (apart from management and two other office employees who appear to be in confidential positions) in the distribution centre not represented, and they will share their non-union status with seasonal employees who appear to have only a temporary attachment to the workplace. The Yard Dispatchers have little prospect of attracting a trade union to represent them, and even if they did, the Board has in the past frowned upon single-classification bargaining units except where the employees belong to a craft.[3] If the Yard Dispatchers were represented by a trade union in a discrete unit, the company would be faced with two bargaining units of employees who clearly do share a community of interest but who bargain separately, use their strike powers separately, and who will no doubt compete for the best wages and working conditions with an eye to what the other bargaining agent has managed to obtain from the company.

33. Finally, though it may be, as counsel for the union submitted, that the degree of integration between the Yard Dispatchers and other bargaining unit employees is not extensive, nevertheless in my view leaving the Yard Dispatchers outside the scope of the bargaining unit would be disruptive of the way in which the company has organized its warehousing operations and would reduce the work opportunities available to all the employees. Most of the current Yard Dispatchers were sourced from positions in the bargaining unit. It is a condition of employment for some employees whose positions are in the bargaining unit to relieve in the Yard Dispatcher position. Moreover, the Yard Dispatcher position appears to be a logical choice to place employees with physical restrictions and/or who are in need of accommodation due to disability. It makes no labour relations sense to disturb these workplace arrangements.

34. In *International Brotherhood of Electrical Workers, Local 353*, [1998] OLRB Rep. Mar./Apr. 212, the Board had similar concerns about the proposed exclusion of five or six general labour/maintenance employees, and stated that the trade union in that case had to take the workforce as it found it. The same principles and concerns apply in this matter, and for all these reasons I find that the union's proposed bargaining unit is not appropriate. An appropriate unit must include the Yard Dispatchers. Consequently their ballots are to be counted.

35. With respect to Mr. Bailey and Ms. Sandu, the Board's decision in *Copernicus Lodge*, [2004] O.L.R.D. No. 4956 (December 8, 2004) is instructive. In that matter, a long-serving employee employed as a registered nurse had been off work on a medical leave for approximately four months prior to the filing of an application for certification. During the course of the medical leave, she discovered she was pregnant. She took a pregnancy leave beginning in July 2004, well after the representation vote, and expected to return to work a year later. The majority of the Board reasoned that an employee with a statutory right to a leave of absence of finite duration and a stated intention to

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[3] Counsel for the union stated in argument that the Yard Dispatchers did have a reasonable prospect to engage in collective bargaining because, once certified, the union would be agreeable in bargaining to their inclusion in the bargaining unit. The union cannot have it both ways, depriving the Yard Dispatchers of the opportunity to participate in the decision to unionize, and then rolling them into the unit subsequently. Nor is the union's delayed willingness to include the Yard Dispatchers probative that they will, in fact, become members of the bargaining unit.

return to work is a person with more than just a tenuous connection to the workplace, and found that the employee was in the bargaining unit.

36. The Board in the *Copernicus Lodge* decision came to the opposite conclusion about another employee of approximately seven years' service who, faced with a brain tumour, commenced an unpaid medical leave of absence out of fear of contracting a corneal infection at work. The employee had been away for about five months when the application for certification was filed. She was cleared by her physician to return to work in May 2004, and in fact was scheduled to return then on a trial basis. However, her underlying condition had not changed, and she remained susceptible to the same workplace infection that had caused her to take her unpaid leave of absence in the first place. Moreover, the Board appears to have been troubled by the employee's evasive testimony about how her employer had come into possession of her doctor's medical clearance note. In all the circumstances, the Board reasoned that there was no basis to conclude that there was any reasonable expectation of the employee's return to work, and found that she was not in the bargaining unit.

37. Similar considerations apply in the matter before me. Ms. Sidhu had a statutorily protected right to a pregnancy leave, as well as a statutorily protected right to reinstatement to her most recently held position, if it existed, or, if not, to a comparable position. She not only had an intention to return to work following her leave of absence, she did in fact return to her previous position. Contrary to the submissions of counsel for the union, I do not find that the company's letter of May 14, 2009 to Ms. Sidhu constituted her termination from employment. Rather, the letter clearly recognizes that an employee on pregnancy leave has a right to reinstatement to a comparable position if her most recently held position no longer exists. At the time of the letter, it would not be possible to know if, upon Ms. Sidhu's expected return in February 2010 a comparable position would be available for her. That issue would have to be explored at the time of her return. Only then would the parties know whether the employment relationship might continue, and only then might termination pay and severance pay possibly be payable if the relationship were to end.

38. As it turned out, despite the May 14 letter's conclusion that Ms. Sidhu's position was eliminated, she was able to assume the same position upon her early return from pregnancy leave. It is somewhat troubling that this turn of events was not explained. However, there could be a number of legitimate reasons why, five months after a layoff, the company needed a full-time Material Processor. After all, the company appears to have been hiring seasonal employees at the time Ms. Sidhu inquired about returning early to the workplace.

39. In my view, the circumstances concerning Ms. Sidhu are similar to those that were in play in the registered nurse in *Copernicus Lodge* decision. Ms. Sidhu was on a statutorily protected leave of absence of finite duration, and she returned to work early as she was entitled to do. Her employment was never terminated in the interim. Accordingly, she had a sufficient connection to the workplace, and her ballot is to be counted.

40. With respect to Mr. Bailey, he had been away from the workplace, earning no wages, for almost twenty months when the representation vote was held. He suffers from extreme chronic pain. He has written one letter, after the representation vote, indicating that he intends to return to work some day when he is stable and healthy. He has given no indication when that might be. He did not testify or respond to his summons. These facts are more strongly in favour of exclusion from the bargaining unit than those concerning the employee on medical leave for the purpose of avoiding an infection in the *Copernicus Lodge* decision. The fact that Mr. Bailey continued to receive group

benefit coverage and to enjoy the privilege of his company discount card may be evidence of a continued employment relationship, but it is not evidence of a substantial connection to the workplace. Nor in my view is it probative of Mr. Bailey's status that the union agreed that Sandra Peixoto, an employee who has been away from work even longer than Mr. Bailey, was entitled to cast a ballot and have it counted. As a general rule, the Board does not look behind such an agreement of the parties because there can be a whole host of reasons – tactical, practical and otherwise - why a party might drop its challenge or accede to the challenge of the party opposite. It does not follow, then, that merely because the parties agree that any particular individual is in the bargaining unit, that therefore other individuals must necessarily also be included. (For a more comprehensive discussion on this issue, see *York University* 2008 CanLII 25678 (ON L.R.B.) and *Rainbow Concrete Industries Ltd.* 2009 CanLII 14027 (ON L.R.B.)) I conclude therefore, that, for purposes of this decision, Mr. Bailey's connection to the workplace was at best tenuous, and that his ballot will not be counted.

41. In summary, the ballots cast by the Yard Dispatchers and Ms. Sidhu are to be counted, but not that cast by Mr. Bailey. A final decision in this matter will issue after the final results of the vote are known.

2118-09-R; 2130-09-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Vansmit Ltd. o/a **Jay-Dee Concrete Forming**, Responding Party

Certification – Construction Industry – Timeliness – Because of a defective initial delivery (by fax) of one of two applications for certification, and the subsequent delivery of the application by courier, the employer asserted that the application was untimely – The Board (differently constituted) ruled on the delivery some three weeks after it was actually made – The present panel held that the employer was required to file its response and Schedule A within two days of the delivery of the application – The Board rejected the employer's position that the application for certification was not "valid" until the Board exercised its discretion to extend the time for delivery: once filed with the Board, the application was always valid – The employer's failure to provide a timely response prejudiced the applicant's ability to ascertain where employees were working on the application date – One certificate issued; second matter continues

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD: January 29, 2010

1. These two proceedings are applications for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant chose to have dealt with pursuant to section 128.1 of the Act. The application in Board File No. 2118-09-R was filed on October 13, 2009. The application in Board File No. 2130-09-R was filed on October 14, 2009.

2. The application in Board File No. 2118-09-R seeks certification in respect of construction labourers employed by the responding party in the industrial, commercial and institutional sector of

the construction industry in the Province of Ontario, and in all other sectors of the construction industry in Board Area 6, with the usual managerial exceptions.

3. The application in Board File No. 2130-09-R initially sought certification in respect of construction labourers employed by the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in Board Area 3. By way of correspondence dated December 22, 2009, the applicant sought to amend its application to seek certification in respect of construction labourers employed by the responding party in all sectors of the construction industry in Board Area 3, except for the industrial, commercial and institutional sector, and except for the usual managerial exceptions.

4. The parties have now attended at a Regional Certification Meeting with respect to each of these proceedings. The Registrar has referred these proceedings to my attention to determine whether any of the outstanding issues can be disposed of without a hearing on the basis of the submissions filed by the parties. I will deal with each of these proceedings separately, below. However, some background information relating to both proceedings is important to appreciate the nature of the issues remaining in dispute.

5. As noted above, the application filing date in Board File No. 2118-09-R is October 13, 2009, and the application filing date in Board File No. 2130-09-R is October 14, 2009. In the latter proceeding, the responding party filed its response in a timely fashion and provided the Board with the information required by subsection 128.1(3) of the Act. In the former proceeding, a question arose regarding whether the applicant had properly delivered the application to the responding party. That question has triggered a second issue, namely whether the responding party delivered and filed the Schedule "A" list of employees in a timely fashion.

6. The applicant states that it delivered both of these applications to the responding party by way of facsimile on October 15, 2009. The responding party states that the application in Board File No. 2130-09-R faxed through, but that the application in Board File No. 2118-09-R did not. Instead, it is asserted that the application in the latter proceeding was illegible. This transmission issue was brought to the attention of the applicant on October 16, 2009. On that same date, it arranged for delivery to the responding party of a hard copy of the application. Accordingly, by October 16, 2009, both applications were in the hands of the responding party.

7. The responding party filed a response to each application on October 19, 2009. Having regard to the application filing date, subsection 7(11) of the Act, and Rules 6.7 and 24.3 of the Board's Rules of Procedure, the responding party took the position in Board File No. 2118-09-R that the applicant did not deliver the application to the responding party in a timely fashion, and asserted that the proceeding ought to be terminated. The covering letter accompanying the response filed with respect to Board File No. 2118-09-R indicates that the response was "completed in a manner consistent with our position herein but without prejudice to any other position our client might take and without acceding there is any valid application to respond to otherwise". The response contains very little of substance. In most of the areas that are typically completed by a responding party to an application for certification, including the Schedule "A" list of employees, the responding party has inserted the words "Not applicable – the application is untimely", or words to that effect.

8. The issue as to whether the application in Board File No. 2118-09-R ought to be terminated was dealt with by a differently constituted panel of the Board through written submissions.

By decision dated November 3, 2009, that panel of the Board sought submissions from the parties. In that same decision it directed the responding party to file with the Board and to deliver to the applicant the Schedule "A" list of employees by November 5, 2009. This the responding party did. For the reasons outlined in decisions dated November 18, 2009 and November 20, 2009, the Board determined that it was advisable to extend the time for delivery of the application under the Board's Rules by one day, and it so ordered. The application in Board File No. 2118-09-R was therefore not terminated.

9. Left unresolved, however, is the question of whether the responding party ought to be entitled to rely upon the Schedule "A" list of employees that it delivered to the applicant and filed with the Board on November 5, 2009. The applicant takes the position that the names on the Schedule "A" list were provided to the applicant so long after they ought to have been provided that the Board ought not to permit the responding party to put them onto the list. The responding party argues otherwise. The parties have filed full submissions on that issue with the Board. I am of the view that the Board can deal with that issue on the basis of the submissions filed with the Board, and do so immediately below.

Board File No. 2118-09-R

(a) Late-Filed Names on the Schedule "A" List

10. The applicant states that the Board ought not to entertain the responding party's additions to the Schedule "A" list. Counsel for the applicant notes that there is absolutely no dispute that the application was received by the responding party on October 16, 2009, and that the responding party delivered and filed a timely response to the application on October 19, 2009. It states that the names ultimately provided to the applicant and to the Board on November 5, 2009 ought to have been included on the Schedule "A" list on October 19, 2009.

11. The applicant characterizes the decision made by the responding party as presumably being a strategic one. Counsel notes that the response provides almost no information at all to the reader, and specifically states that no employees are listed on the Schedule "A" because the application is untimely. Counsel asserts that the repeated assertion by the responding party that the application was untimely does not alter the position that it took - namely that there were no employees in the bargaining unit sought by the applicant on the application filing date. The applicant states that the responding party was or ought to have been alerted to the significance of this issue by the observation made by the Board in its October 22, 2009 decision that the responding party had failed to provide the information required by subsection 128.1(3) of the Act. It also notes that the responding party only provided the names it desires to include on the Schedule "A" list of employees as a result of the subsequent direction of the Board to do so dated November 3, 2009, just short of three weeks after it ought to have disclosed that information.

12. The applicant does not concede that the Board has the discretion to relieve against the time limits set out in subsection 128.1(3) of the Act, but if the Board does have that discretion, the applicant asserts that there must be an adequate reason for doing so, and that in the absence of some good excuse, the Board should adhere to the clear legislative directive set out in the Act. Here, the applicant asserts that there is no good excuse for failing to file the information until three weeks after the date the response was due.

13. In addition, the applicant notes that the Board has considered the potential for prejudice in relieving against the two day time limit set out in the Act, and has found that in the construction industry, where status turns on the specific activities of employees on a single application filing date, a delay of even a week results in prejudice to the union. Counsel notes that the union is often required to reconstruct the events of a specific day with respect to work sites and employees it had no knowledge were in dispute. Here, the responding party seeks to add 20 names to the Schedule "A" list. The applicant challenges 15 of those names, and the responding party has not identified what job sites these individuals are said to have been working at on the application filing date. Counsel submits that it is extremely prejudicial to require an applicant to investigate challenges and to marshal evidence to address those challenges when it learns of the identities of the individuals so late after the application filing date.

14. The applicant relied upon the decisions of *D.D.R. Landscape Contractors Ltd.*, 2008 CanLII 40838 (ON L.R.B.), *D.D.R. Landscape Contractors Ltd.*, 2008 CanLII 56508 (ON L.R.B.), and *Reids Uptown Homes*, 2007 CanLII 17488 (ON L.R.B.) in support of its positions.

15. The responding party states that as the Board has determined to exercise its discretion in favour of the applicant to extend the date for delivering the application, it is only proper, fair and in accordance with the rules of natural justice that the Board not allow the exercise of that discretion to imperil the other party. Counsel submits that it was only after the Board exercised its discretion to extend the date for delivery of the application that the responding party was faced with a valid application for certification. It asserts that then, and only then, was the responding party required to provide a Schedule "A" list. In accordance with this view, the responding party states that if the issue is one of the timely delivery and filing of the Schedule "A" list, the fact that it delivered and filed that list on November 5, 2009, well in advance of the decisions of the Board dated November 18 and 20, 2009, means that it actually provided the list *in advance of* the time it was obliged to do so.

16. To the extent that the Board is of the view that it is necessary for it to exercise its discretion to consider the list of employees delivered and filed by the responding party, counsel for the responding party relies upon the decision of the Board in *Weathertech Restoration Services Inc.*, [2008] OLRB Rep. November/December 832 (November 20, 2008), and the decisions of the Divisional Court and Ontario Court of Appeal in *Maystar General Contractors Inc.*, 2007 CanLII 8928 (ON S.C.D.C.) and 2008 ONCA 265, respectively, for the proposition that the Board ought to exercise its discretion in favour of considering the late-filed information.

17. In support of its assertion that the Board ought to exercise its discretion, the responding party makes the following arguments:

> (a) the applicant made very detailed challenges to the Schedule "A" list at the Regional Certification Meeting and therefore has had more than sufficient time to investigate and secure the information required to challenge the individuals it challenges;
>
> (b) the applicant has marshalled ample evidence in Board File No. 2130-09-R, and there is no reason to believe that it did not do so here;
>
> (c) the applicant was well aware by October 16, 2009 that the responding party was challenging delivery of the application in Board File No. 2118-09-R, and therefore the applicant must be assumed to be prepared to deal with the ICI

> component of the application because it was a live issue in the other proceeding as well;
>
> (d) because the applicant knew that it was filing two applications for certification within one day of each other, it would have been aware of where the work was being performed and by whom on the application filing dates. If the applicant states otherwise, the difference in views ought to be resolved by way of hearing and not by way of presumption;
>
> (e) with respect to the applicant's assertion that it was entitled to have specific work sites disclosed earlier in the process, the responding party's employee list produced on November 5, 2009 is the exact same information that the applicant would have received had the application been valid from the start and should the names have been placed on the Schedule "A" list filed with the response; and
>
> (f) there has been no request from the applicant for specific work sites at any time. If this information was so critical, the applicant sat on its rights and ought not to be entitled to claim prejudice.

The responding party disputes that there is any prejudice to the applicant in the circumstances, states that such prejudice ought not to be presumed, and urges the Board to put the applicant to the strict proof of such prejudice.

17. In the alternative, the responding party notes that the Board must still consider the fact that this application relates to a bargaining unit consisting of ICI and non-ICI bargaining rights. The responding party notes that the only work site referred to in the application is in Cambridge (which is in Board Area 6), and states that the only work being performed on that site was residential work and not ICI work. According to the responding party, the only ICI sector work it performed on the application filing date was performed in Amherstburg and Windsor. Counsel asserts that the applicant is either attempting to seek ICI certification when it did not have any ICI work to attach to, or intentionally failed to provide names of employees in its proposed bargaining unit list who were performing ICI work. The responding party states that it is incumbent upon the Board to reconcile this issue before it can certify the applicant.

18. Further to the above-mentioned argument, the responding party relies upon subsection 128.1(5) of the Act and asserts that the applicant misrepresented the nature of the work being performed on the application filing date when it knew or ought to have known that it was not relying upon any ICI work being performed that day, or, alternatively, failed to include those employees it knew were performing ICI work and would be included within the bargaining unit. The responding party states that in these circumstances the Board should schedule a hearing to consider the misrepresentation before determining the application, in accordance with subsection 128.1(6) of the Act.

19. I have considered the positions of the parties on this question. In my view, the Board ought not to consider the list of employees delivered to the applicant and filed with the Board on November 5, 2009. I have reached this conclusion for the reasons set out immediately below.

20. First, for the reasons I expressed earlier in *Weathertech Restoration Services Inc.*, cited above, I am of the view that the Board does have the discretion to consider late-filed information filed with it pursuant to subsection 128.1(3) of the Act. As stated at paragraph 94 of that decision, the Board will exercise its discretion to consider late-filed information having regard to all of the circumstances before it, but those circumstances must establish a compelling case for relief. I also noted in that decision that because prejudice typically accrues to trade unions in the construction industry when a late response is delivered and filed with the Board, the Board will be reluctant to exercise its discretion to consider late-filed information in the absence of those compelling circumstances.

21. The responding party received the application for certification from the applicant on October 16, 2009 at the very latest. It was entitled to take the position that the application had not been delivered by the applicant in accordance with the time period dictated by the Board's Rules, and to urge the Board to terminate the proceeding in accordance with Rule 24.3.

22. However, the key underlying assertion made by the responding party – that the application was not a "valid" application until November 18, 2009, when the Board exercised its discretion to extend the time for delivery of the application to October 16, 2009 – has no merit. Once filed with the Board, this application for certification was always "valid", in the sense that it was an active, subsisting proceeding of the Board. The application was provided with a Board File number and it was processed by the Registrar's office. It was delivered to the responding party, and a Confirmation of Filing was sent to the responding party in accordance with the Board's normal procedures. As a result of questions surrounding the timing of its delivery the application may well have been subject to termination should the Board not have determined to exercise its discretion to extend the time for proper delivery. However, until a decision is made in those circumstances to terminate the proceeding, the application is very much a "valid" application, and the responding party must respond to it.

23. Accordingly, it is simply wrong for the responding party to assert that the list of employees delivered by the responding party to the applicant and filed with the Board on November 5, 2009 was delivered in advance of the time that the list was required to be delivered and filed. Assuming a delivery dated of October 16, 2009, the Schedule "A" list of employees was due to be delivered to the applicant, and filed with the Board, on October 20, 2009. Instead it was delivered and filed on November 5, 2009, sixteen calendar days later.

24. In these circumstances, it is necessary to consider whether it is appropriate to exercise the Board's discretion to consider the late-filed information by the responding party. In my view, the responding party has not established compelling circumstances for the exercise of the Board's discretion in this proceeding.

25. The Board has in previous decisions identified the type and the extent of the prejudice that accrues to a union when a responding party to an application for certification files its Schedule "A" list with the Board beyond the time period contained in the Act and the Board's Rules (see, for example, *Reids Uptown Homes*, cited above, and *Carman Construction Inc.*, [2008] OLRB Rep. January/February 1) (January 8, 2008).

26. In the construction industry, the success or failure of a card-based construction industry application for certification typically depends upon establishing the work tasks performed on the

application filing date by each individual said to be in the bargaining unit. Any given individual at work may have performed many different tasks on the application filing date, for different periods of time. Some of those tasks may be bargaining unit work, and some may not. The proper characterization of some or all of those tasks may be in dispute. Securing information regarding the work tasks performed on the application filing date is critical to both parties in a card-based application for certification, but it is particularly critical for the applicant, that has limited knowledge of the full scope of the responding party's business. It needs the information to confirm the accuracy of its prior belief that it had the support of more than 55 percent of the employees in the bargaining unit on the application filing date.

27. On occasion an applicant is not fully informed about the employer's operations and misses one or more legitimate job sites at which the employer is working on the application filing date. On occasion a responding party asserts that one or more job sites were live on the application filing date, when in fact they were not. The applicant may or may not have information about the status of any such job sites. Accordingly, it is quite possible that an applicant may not be aware of the existence of individuals that are said by the employer to have been at work in the sought after bargaining unit on the application filing date.

28. When the applicant receives the Schedule "A" list from the responding party and reviews the names on that list, it secures its first opportunity to understand who the employer asserts was at work in the bargaining unit on the application filing date. If there are any questions in the mind of the applicant regarding the legitimacy of the names placed on that list by the responding party, the applicant can immediately commence its investigation of the status of those individuals by speaking to its supporters about the individuals in question.

29. When a responding party delivers its Schedule "A" list beyond the two day time limit reflected by subsection 128.1(3) of the Act and Rule 25.5 of the Board's Rules of Procedure, it becomes considerably more difficult for the applicant to secure credible evidence regarding what work previously unknown individuals were actually performing on the application filing date, and for how long they were performing that work. On most construction sites, where work is performed routinely and repetitively, it is often difficult for individuals to recall the work that they themselves were doing a few days earlier (and for how long), let alone the work that other workers might have been performing on that day. Accordingly, the late delivery of the Schedule "A" list of names makes it extremely difficult for an applicant to secure credible evidence regarding the work tasks performed by any previously unidentified individuals. The degree of difficulty increases as time progresses.

30. With that reality in mind, the observation made by the responding party regarding the sufficiency of the investigation apparently conducted by the applicant is not particularly persuasive. It may well be, as the responding party asserts, that the applicant has secured certain information regarding the 15 individuals challenged in this proceeding. The applicant (like the responding party) is bound to the positions it takes at the Regional Certification Meeting, so it is not in the position to "underplay" its hand at that time and subsequently assert one or more additional positions. A review of the Certification Worksheet prepared by the Labour Relations Officer at the Regional Certification Meeting reflects that the applicant has identified seven separate grounds upon which it challenges individuals, and has adopted one or more of those grounds for each of the 15 individuals in dispute. The fact that the applicant has done so hardly allows for the conclusion that the applicant has secured credible evidence through witnesses that can establish, on the balance of probabilities, what work

tasks the 15 individuals actually performed on the application filing date, and for how long. In fact, the seven grounds relied upon by the applicant are *pro forma*, and one might actually infer from the liberal amount of "mixing and matching" of those various grounds that the applicant has incomplete information regarding at least some of the individuals on the list.

31. Assuming for the purposes of this decision that the applicant has secured ample evidence to deal with the challenges in the other proceeding, Board File No. 2130-09-R, that fact does not allow for the conclusion that the applicant can easily establish its positions in this proceeding. In the construction industry the work performed on the application filing date is critical. Everything focuses upon that one specific day. Because the application filing date in both of these proceedings is different, knowledge of the identity of the bargaining unit employees and what those employees were doing on the application filing date in one proceeding does not translate into any meaningful information regarding the work performed by bargaining unit employees on the other application filing date. In that regard, the responding party also states that because the applicant knew that it was filing two applications for certification within one day of each other, it would have been aware of where work was being performed, and by whom, on the application filing date. It further states that because the ICI sector was a common element to the applications, the applicant must have knowledge of the work being performed and the identity of the workers performing that work. This is not necessarily so. The applicant might be aware of that information, or it might not. Given the fluidity of work and work sites in the construction industry, it cannot be said that knowledge of the work and sites at which that work was performed on one day translates to knowledge of that same information on another day.

32. The responding party also takes issue with the applicant's complaint that it has been deprived of knowledge of the job sites at which the responding party asserts work was performed on the application filing date. The responding party states that the applicant would not have secured this information until the Regional Certification Meeting in any event, and that because the applicant has not specifically requested that information, it can hardly be heard to complain about not having been provided with it.

33. I disagree. Paragraph three of the response form requires the responding party to list each job site in the bargaining unit proposed by the applicant at which the work was being performed on the application filing date. Here, the responding party inaccurately stated that there were no such sites, on the basis that the application was untimely. It is fair to say that the responding party is not required to identify in the response where each of the individuals listed on the Schedule "A" list was working on the application filing date. That information is typically provided to the applicant later in the process. However, for the reasons set out above the applicant is entitled to know upon receipt of the response where the responding party asserts bargaining unit work was being performed on the application filing date. It need not request that information – the responding party is required to provide it in the response. Here, the responding party did not do so. To not provide that information to the applicant hinders its ability to investigate the circumstances as they existed on the application filing date.

34. Throughout its submissions the responding party asserts that the applicant ought not to be entitled to take advantage of a presumption that it has been prejudiced, and ought to be required to establish that prejudice by way of *viva voce* evidence.

35. This is a submission that has been made in prior cases, one that has been rejected by the Board. At the heart of the basis for rejecting this proposition is subsection 119(1) of the Act, which provides as follows:

> **119.** (1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

To require a union in each case to establish by way of *viva voce* evidence at a hearing that it has been prejudiced by the responding party's failure to provide one or more names on the Schedule "A" list in a timely fashion would inevitably expose to the employer the identities of those bargaining unit employees who support the union. Using the instant case as an example, on the responding party's theory the applicant would be required to establish what it knew about, and did not know about, as at the application filing date, the 15 individuals that it challenges on the late-filed Schedule "A" list. The union would have to call evidence through its organizers to establish the identities of those persons on the list who had not been previously mentioned by its supporters as bargaining unit employees. Union organizers would be subject to cross-examination regarding who had been identified to them as potential bargaining unit employees, and who had not been so mentioned. The responding party would seek to establish that some of these previously unknown names had been mentioned previously to the union, and would ask questions of the witnesses about the source of the information provided to them. From this information it would be easy for the employer to identify those of its employees upon whom the union relied for information, and therefore identify those employees who supported the union during organizing.

36. An inquiry such as that suggested by the responding party is contrary to section 119(1) of the Act, and would effectively eviscerate organizing in the construction industry (and therefore is inconsistent with one of the purposes of the Act set out in section 2 of the legislation, namely to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees). Such an inquiry is unnecessary. The Board has been found to be a specialized expert tribunal (see, for example, *Abdoulrab v. Ontario (Labour Relations Board)*, 2009 ONCA 491 (CanLII), at para. 46), and can take administrative notice of the fact that delay in filing all or part of a Schedule "A" list of employees by a party responding to a construction industry application for certification will, in the normal course, result in prejudice to the applicant.

37. In this case, where the responding party filed a response that failed to include a Schedule "A" list, no legitimate explanation for the failure to file the Schedule "A" list has been offered by the responding party. Furthermore, I am satisfied that the applicant has been prejudiced by the late filing of the Schedule "A" list. For all practical purposes, by November 5, 2009 it was impossible for the applicant to secure credible evidence regarding the work performed on the application filing date by the 15 challenged individuals that the responding party desires to include on the Schedule "A" list. In these circumstances, no compelling circumstances have been offered by the responding party to support the proposition that the Board should exercise its discretion pursuant to subsection 128.1(3)

of the Act. For these reasons I decline to exercise my discretion pursuant to subsection 128.1(3) of the Act to consider the late-filed Schedule "A" list.

(b) ICI Bargaining Rights Claimed by the Applicant

38. The responding party has raised a second, separate issue with respect to this application. It notes that the application seeks a bargaining unit which includes the ICI sector of the construction industry. However, it states that the only work being performed in Board Area 6 on the application filing date was work in the residential sector of the construction industry. It states that ICI sector work was being performed in Amherstburg and Windsor. As a result, the responding party asserts that the applicant is not entitled to ICI bargaining rights or, alternatively, intentionally failed to provide the names of those employees in its proposed bargaining unit that performed ICI work on the application filing date. It asserts a misrepresentation on the part of the applicant.

39. This issue can also be dealt with on the basis of the written submissions of the parties.

40. There are two simple answers to the concern raised by the responding party. First, ICI bargaining rights are secured in the Province of Ontario on a province-wide basis. Accordingly, if the applicant desires to secure bargaining rights for construction labourers employed by the responding party in the ICI sector of the construction industry and in all other sectors of the construction industry in Board Area No. 6, as it does here, the list of employees would include all construction labourers performing construction labourers work in all sectors of the construction industry in Board Area No. 6, and any other construction labourers employed by the responding party performing ICI sector work anywhere else in the province on the application filing date. Here, that would include any construction labourers on site in Windsor and Amherstburg.

41. But even if the ICI work in Windsor and Amherstburg did not involve any construction labourers on the application filing date, or if the applicant was unaware of those two individuals, the applicant could still seek ICI bargaining rights. In *Clean Water Works Inc.*, [2008] OLRB Rep. March/April 171 (March 3, 2008), the Board stated the following:

> 13. Clean Water Works asserts that it had no employees in the ICI sector of the construction industry on the application filing date. Even if this assertion is factually accurate, it does not preclude the Board from issuing a certificate that relates to the ICI sector, as mandated by section 160(1) of the Act. In the recent decision of *Labelle Brothers Construction* (Board File 1266-07-R, decision dated July 18, 2007), the Board made the following observations regarding the very same argument made by the responding party in that proceeding:
>
>> 11. Furthermore, the responding party suggests because its employees were not employed in the industrial, commercial and institutional sector, then the application for certification cannot have that sector included in an appropriate bargaining unit. If an application for certification relates to the industrial commercial and institutional sector of the construction industry, the description of the appropriate bargaining unit is mandated by section 158(1) of the Act and therefore must include that sector as an element of the description of the appropriate bargaining unit. Whether an application for certification "relates" to the industrial, commercial and institutional sector of the construction industry depends on the applicant indicating that it seeks a bargaining unit that includes

> that sector. In other words, the applicant trade union decides when it makes its application for certification whether its application will relate to that sector. See *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729 at 1733; *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210 at 214; *Adams Report to the Minster of Labour*, May 1, 1980; *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166. The Board in *Aero Block and Precast Ltd.*, wrote at page 1175:
>
>> In the Board's decision in *Colonist Homes, supra,* it interpreted section 144 [now 158] of the Act to mean that the applicant in an application under that section, and not the Board, decides whether the application relates to the ICI sector and is made under section 144(1) of the Act or does not relate to the ICI sector and is made under section 144(3).
>
> 12. The applicant clearly indicated this application relates to the industrial, commercial and institutional sector of the construction industry because the bargaining unit it proposed encompassed that sector of the construction industry. The Board can find an appropriate bargaining unit includes both the ICI sector throughout the province and an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application. See, for example, *Colonist Homes Ltd., supra*; *Pelar Construction Ltd., supra* and *Walloy Excavating Company Ltd.*, [1986] OLRB Rep. April 576. The Board is satisfied the bargaining unit proposed by the applicant is an appropriate bargaining unit consistent with section 158(1) of the Act whereas the bargaining unit proposed by the responding party is not in the circumstances of this application.

42. To the extent that the responding party asserts this position in this proceeding, there is no fact pleaded in this proceeding that suggests that any result other than the result set out above ought to occur here. The applicant seeks a bargaining unit that includes the ICI sector of the construction industry, and it is entitled to seek that unit. The fact that the applicant seeks such a unit and did not refer in its application to the existence of the two employees in Windsor and Amherstburg alleged to be performing ICI sector work does not allow for the conclusion that the applicant misrepresented its position.

43. There are no other issues that need to be determined before the Board can deal with this application on the merits. In the circumstances, the applicant is entitled to have its application for certification determined by reference to the materials it has filed with the Board.

44. The Board finds that this is an application for certification within the meaning of section 128 of the Act and is an application made pursuant to section 158(1) of the Act which provides that:

> An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126 shall be brought by either,
>
> (a) an employee bargaining agency; or

> (b) one or more affiliated bargaining agents of the employee bargaining agency,
>
> on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (2) or by voluntary recognition.

45. For the reasons set out above, the Board finds, pursuant to section 158(1) of the Act, that all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the responding party in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

46. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant), the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of constituent locals of the applicant at the time the application was filed. The applicant asserted there were five persons in the bargaining unit and filed membership evidence on behalf of three of those five persons.

47. The applicant has asked that it be certified pursuant to section 128.1 of the Act relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. There is nothing raised in the application or the response that would cause the Board to consider directing a representation vote.

48. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting.

49. The Board is satisfied that it should certify the applicant.

50. Section 128.1(24) of the Act, which states as follows, provides for the issuance of more than one certificate if the applicant has the requisite support:

> If an election under this section is made in relation to an application for certification that relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126,
>
> . . .
>
> (b) if the Board certifies the trade unions on whose behalf the application for certification was brought as the bargaining agent of the employees in the bargaining unit under clause (13)(a), it shall issue one certificate that is confined to the industrial, commercial and institutional sector

> and another certificate in relation to all other sectors in the appropriate geographic area or areas;
>
> ...

Therefore, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council in respect of all construction labourers in the employ of Vansmit Ltd. o/a Jay-Dee Concrete Forming in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

51. Further, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of Vansmit Ltd. o/a Jay-Dee Concrete Forming in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

Board File No. 2130-09-R

52. As noted above, the application in Board File No. 2130-09-R initially sought certification in respect of construction labourers employed by the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Board Area 3. By way of correspondence dated December 22, 2009, the applicant sought to amend its application to seek certification in respect of construction labourers employed by the responding party in all sectors of the construction industry in Board Area 3, except for the industrial, commercial and institutional sector, and except for the usual managerial exceptions.

53. At the Regional Certification Meeting in this proceeding the responding party agreed with the applicant's proposed amended unit. Having regard to that agreement, the Board finds that all construction labourers in the employ of the responding party in all sectors of the construction industry in Board Area 3, excluding the industrial, commercial and institutional sector, save and except for non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees that is appropriate for bargaining.

54. I note here that the responding party raised in its written submissions in this proceeding an argument relating to the "count" in Board File No. 2118-09-R. Initially the applicant had sought ICI bargaining rights in both this proceeding and in Board File No. 2118-09-R, and therefore the application of subsection 111(3) of the Act was raised by the Board in a prior decision. As a result of amending the bargaining unit sought in this proceeding, the subsection 111(3) issue is no longer relevant. However, the responding party states that those employees whom the applicant "claimed as performing ICI sector work never could have been part of the employee count for the non-ICI bargaining unit work" in this proceeding, and that now that the applicant has altered its unit "there must be a different count".

55. For the reasons identified above in the decision relating to Board File No. 2118-09-R, it was always appropriate for the applicant to seek ICI bargaining rights in this proceeding. Now that the applicant has amended its application in this proceeding to seek only non-ICI bargaining rights in Board Area No. 3, the only individuals who will "count" for the purposes of determining the applicant's support are those individuals who were at work in the bargaining unit performing bargaining unit work on the application filing date. Any construction labourer performing ICI sector work anywhere in the Province of Ontario on the application filing date is excluded from the bargaining unit sought in this proceeding, and therefore that person's support would not be included in the "count" should the applicant have filed such support with the Board.

56. The responding party filed with the Board a timely Schedule "A" list of employees that contained the names of 11 individuals. At the Regional Certification Meeting the parties agreed that one person, John Lavoie, was properly on the list. The applicant challenged the other 10 individuals on the list and proposed that two names be added to the list. The responding party challenged the two individuals whom the applicant desired to add to the list.

57. Each party has now delivered its status submissions and filed them with the Board. The responding party acknowledges that Russ Gray, Tyler Gray, Randy Laliberte, Denis Marchand, Rich Merner and Brent Paquette (numbers 3, 4, 6, 8, 9 and 11, respectively, on the Certification Worksheet) were not working in Board Area 3 on the application filing date. Furthermore, the responding party agrees that the two individuals sought to be added to the Schedule "A" list by the applicant were, in fact, at work in the bargaining unit on the application filing date. As a result, the current Schedule "A" list of employees consists of the following seven individuals:

Michael Bento	Agreed on List
Rob Campbell	Challenged by Applicant
Casey Cullen	Challenged by Applicant
Denis Hebert	Challenged by Applicant
John Lavoie	Agreed on List
Steve Moody	Challenged by Applicant
Corado Naccarato	Agreed on List

58. The four outstanding status disputes can only be dealt with after a hearing has been held to hear the evidence and submissions of the parties. Having regard to Board Information Bulletin No. 9, the responding party will be responsible for ensuring that the four remaining individuals in dispute attend at the hearing and will be responsible at first instance for calling those individuals as witnesses. Any other procedural issues that may arise can be dealt with by the panel of the Board assigned to hear this proceeding on the merits.

59. Board File No. 2130-09-R is referred to the Registrar for the purpose of setting one or more hearing dates to entertain the evidence of the parties regarding the outstanding status issues.

60. I am not seized of this proceeding.

2536-09-M; 2388-09-U Universal Workers Union, Labourers' International Union of North America, Local 183 on its own behalf and on behalf of its Members and Executive Board, Applicant v. **Labourers International Union of North America;** Joseph S. Mancinelli; Ronald A. Pink, Q.C. and Cosmo Manella, Responding Parties

Construction Industry – Interim Relief – Unfair Labour Practice – During the course of a LIUNA investigation into the operations and affairs of Local 183, the Local complained that LIUNA was interfering with Local 183's ability to perform its duties – The complaint alleged that the investigator refused to disclose reasons for the investigation, the source of the information that instigated the investigation, or when the investigation would be completed – Local 183 said the investigator was intrusive and interfering with its autonomy by requesting huge volumes of original documents including material that encroached on its executives' personal lives and by ordering Local 183 to reinstate employees who they say were laid off for good reasons – The Board found that it has jurisdiction to make interim orders concerning procedural matters only and it must be satisfied that the order(s) requested are necessary to preserve the processes of the Board until the hearing in the Main Application is concluded – Local 183 was seeking to restrain LIUNA's activities without the necessary connection between these activities and the need to protect the Board's process interests being present – Unlike Local 183's 2004 application which the Board distinguished, this investigation was not initiated following filing of an application; it had been ongoing at the time the Main Application was filed – The investigation was not commenced in a way that was an attempt to or would have the effect of interfering with the Board's processes – The Board was not satisfied that the investigation would have any significant impact on Local 183's ability to carry out its statutory obligation to bargain – Application dismissed

BEFORE: *Charles E. Humphrey*, Vice-Chair.

APPEARANCES: *D. Wray, Jesse Nyman, Durval Terceira, Daniel Avero, Jaime Melo, Gaetano Strazzanti* and *Michael O'Brien* for the applicant; *James Hayes, Elichai Shaffir* and *Adam Beatty* for the responding party of LIUNA/Mancinelli/Manella; *Sean McGee* for the responding party Ronald A. Pink, Q.C.

DECISION OF THE BOARD: January 5, 2010

1. This is an application for an interim order, Board File No. 2536-09-M. The applicant asks the Board to grant interim relief pending the outcome of the hearing of its application under section 96 of the Act Board File No. 2388-09-U (the Main Application). In the Main Application the applicant alleges violations of sections 76, 87(2), 147 and 149. The applicants in their application for interim relief ask the Board to make a number of orders including:

> 1) an order directing the responding parties to cease and desist with the investigation into Local 183 and its executive board;
>
> 2) an order directing the responding parties to cease compelling the supply of documentation and submission to interviews by Local 183, its employees or executive board members;

3) orders staying or prohibiting proceedings against Local 183 or its Executive Board by the responding parties.

2. The essence of the factual background in the Main Application is outlined below. At this point this factual background is based on unproven assertions made by the parties in their pleadings and documents filed that have not been proven or placed in context through evidence.

3. I have used Local 183 to refer to all of the applicants except where the context indicates otherwise. The Labourers International Union of North America is referred to as LIUNA.

4. The applicant says that for some time prior to April 2009 there were issues between the leadership of the applicant Local 183 in particular Mr. Durval Terceira, Business Manager and Mr. Daniel Avero, Secretary/Treasurer/Assistant Business Manager and the leadership of LIUNA in particular, Mr. Joseph S. Mancinelli LIUNA's International Vice President and Central and Eastern Canada Regional Manager and Mr. Cosmo Manella LIUNA's Director of the Tri-Fund. These issues included disagreements over who was to pay the costs of the trusteeship imposed on Local 183 that ended in October 2007, payment of fees for communication consultants and issues relating to the geographic scope of Local 183 jurisdiction. The application states that Mr. Mancinelli and Mr. Manella were angered at Local 183 positions on some of these issues.

5. The individual responding party Mr. Ronald A. Pink, Q.C. is Special Counsel Canada (SCC) to LIUNA. The SCC is appointed by the General President of LIUNA under the President's broad authority found in the LIUNA constitution "to appoint such personnel as the General President may deem necessary to assist in carrying out all of the duties and functions of the office." The LIUNA Canadian Ethical Practices Code (Code) specifically provides for the appointment of an SCC and provides that "for purposes of enforcing this Code, all of the investigative and prosecutorial powers described in the LIUNA Constitution, Uniform Local Constitution and Uniform District Council Constitution are hereby delegated to the SCC." The Code generally deals with the ethical practices standards required of Locals, their employees, members and officers.

6. On April 17, 2009, Mr. Pink in his capacity as SCC advised the executive of Local 183 that he was, "conducting an investigation into the operations and affairs of Local 183." In his letter advising Local 183 of the investigation he went on to say that, "the investigation will encompass the entire functioning of Local 183." At the time of the consultation in this matter Mr. Pink's investigation was continuing.

7. Mr. Pink's investigation is the focus of the Main Application and this interim application. The applicant says that it is no coincidence that Mr. Pink's investigation began a relatively short time after Mr. Mancinelli expressed disapproval with the lack of compliance with his wishes by Mr. Terceira and Mr. Avero. The applicant says Mr. Pink's investigation was instigated in order to make Local 183 and its leadership compliant with LIUNA's directions. That by doing this LIUNA is interfering with Local 183 autonomy without just cause contrary to section 149 of the Act.

8. Local 183 complains that it has never been told what is being investigated, the nature or source of the information leading to the commencement of the investigation or when the investigation will be completed. Local 183 further complains that while it has co-operated fully in providing information to Mr. Pink, he has been unresponsive to Local 183 and their counsel's request for information regarding what is being investigated. At the same time, Local 183 says Mr. Pink has

been making demands that they provide huge volumes of original documents including material that intrudes into the personal lives of its executive. In addition to conducting the investigation in a very intrusive manner, which they say interferes with their autonomy, Local 183 also says Mr. Pink has interfered with Local 183 autonomy in other ways. Mr. Pink they say has done this by ordering them to reinstate employees who they say were laid off for good reason and directing their employees to attend interviews with Mr. Pink without notice to Local 183.

9. Mr. Mancinelli and Mr. Manella say they have had nothing to do with the initiation of Mr. Pink's investigation and have no involvement in the investigation while acknowledging that there have been some conflicts with the Local 183 leadership on certain issues. Mr. Pink says he started and has pursued his investigation based solely on information provided by informants and additional information discovered in the course of the investigation. He says there is no link between his decision to initiate the investigation and LIUNA. He acknowledges that the investigation process is intrusive but says that such an approach is contemplated by the Code.

10. There does not seem to be any dispute about the fact that Mr. Pink's investigation is not the final stage in the process. That is if he concludes that there is any wrong doing by any individual this may result in charges being laid under the Canadian Ethical Practices Code. The Code provides for such charges to be heard by a Canadian Independent Hearing Officer.

11. The above is only intended as a sketch of the factual framework upon which this application is based not a comprehensive description of the facts alleged or positions of the parties. The fact that much detail has been omitted does not mean that I have not considered the detailed materials and representations provided by the parties.

12. In my view the legal issues raised by this application fall under three headings:

1. Nature of the remedy;
2. Jurisdiction of the Board to grant the remedy sought;
3. Exercise of the Board's discretion to grant the remedy sought.

NATURE OF THE REMEDY

13. An interim order is an extraordinary remedy. The factual foundations for such orders are by their nature less certain than decisions made following a full hearing. The Board must do the best it can with the factual assertions made by the parties. In granting such orders there is always the risk of unintentionally giving an unwarranted tactical advantage to a party. On the other hand such remedies are only interim not final and are subject to alteration if circumstances change. From the Board's perspective it is always appropriate to approach a request for an interim order with a reasonable degree of caution. This is perhaps particularly so when one is dealing with as complex an issue as the relationship between a trade union local and its parent organization.

JURISDICTION TO GRANT THE REMEDY

14. In this case the source of the Board's jurisdiction to grant the interim remedy requested is found in subsection 98(1)(a) which provides that:

> **98.** (1) On application in a pending proceeding, the Board may,
>
> (a) make interim orders concerning procedural matters on such terms as it considers appropriate;
>
> . . .

15. The Board in an earlier case, *Labourers International Union of North America* [2004] OLRB Rep. March/April 338 (March 17, 2004), involving some of the same parties when considering the meaning of the phrase "make interim orders concerning procedural matters" commented at paragraph 51,

> ... I agree with the argument of Local 183 that section 98(1) creates jurisdiction to make orders that do not amount to substantive orders, but that provide more than orders in respect of procedural issues that arise in respect of the hearing, powers already granted to the Board in sections 111 and 114. ...

16. The Board in *Brick and Allied Craft* [2007] CanLII 16241 (ON L.R.B.) elaborated on the meaning of "procedural" in this context with the following comment, at paragraph 21:

> . . .
>
> In the *Labourers International Union of North America Local 183, supra, and United Brotherhood of Carpenters and Joiners of America, Local Union 93, supra,* the Board interpreted subsection 98(1)(a) as giving the Board the power to do what was necessary to preserve the process of the Board pending the litigation of the application before it. The orders made were "procedural" because they preserved the Board's process from becoming irrelevant by the time a decision was made. To some extent, that exercise involves an identification of the legal rights at issue in the proceeding, and an assessment of the likelihood of certain events occurring in the short term. To the extent that an order is necessary to preserve some meaning for the Board's process, it may well be required to preserve some prevailing conditions for the purpose of being able to adjudicate them.
>
> . . .

17. The Board in the cases referred to above has identified three categories of interim orders:

> 1) orders which deal with procedural matters that arise in respect of a hearing and are made under the specific power granted in sections 111 and 114 of the Act as well as under the general power contained in section 98.
>
> 2) orders which deal with procedural matters that are related to preserving the Board's process pending litigation in an application and are made under subsection 98(1)(a).

3) orders which are substantive in that they affect substantive rights of the parties pending the outcome of litigation, such as the power to grant interim reinstatement under subsection 98(1)(b).

18. The Board has not been granted the power to issue interim orders dealing with substantive rights of parties in the case of applications under the provisions of the Act claimed in the Main Application to have been violated. The only source of the Board jurisdiction to issue interim orders in this application is section 98(1)(a). In order to find that it has such jurisdiction the Board must be satisfied that the order(s) requested are, necessary to preserve the process of the Board until the hearing in the Main Application is concluded.

DOES THE BOARD HAVE JURISDICTION TO GRANT AN INTERIM RELIEF IN THIS CASE?

19. In the facts of this case I have come to the conclusion that the Board does not have jurisdiction to grant the order for interim relief. In reaching this conclusion I have been mindful of the broad scope and intrusive nature of the investigation. I have also taken into account the other intrusions into the operation of the local pleaded by the applicants. However when considered from the perspective of the impact on Board process interest I am unable to find that the orders requested are necessary to protect that interest at this time. Based on the facts pleaded by the applicant the investigation has undoubtedly been disruptive, time consuming, demanded the reallocation of resources, cost money and created stress for those affected by it. The experience has not been made anymore pleasant by the uncertainty surrounding the subject of the investigation or when it will be concluded. The intrusion of the investigation into human resources decisions of the applicant may have created some uncertainty about where authority resides within the organization. However in my view the fact that there events have occurred or continuing to occur does not lead to the conclusion that interim relief is required to protect the Board's process interest. I am not satisfied on the basis of the information before me that the effectiveness of the Board's process is being put at risk by the continuing investigation. Rather in my view the orders sought are more in the nature of requests for substantive orders. That is orders that seek to restrain the activities of the responding parties without the necessary connection between these activities and the need to protect Board process interests being present.

20. At this stage given that the subject of the complaint is an investigation which may or may not lead to further actions there is not a factual basis for concluding that the investigation may render any Board remedy in the Main Application ineffective particularly having regard to the broad powers granted to the Board under section 149. If this changes the applicant will have the opportunity, if they choose, to seek the Board's assistance in a new application for interim relief.

21. I have taken into consideration the submissions of applicant counsel that there is no principled reason why the interim order should not be granted in this case given that it was granted in the LIUNA 2004 case referred to above. The Board in that case did conclude that it had jurisdiction to grant the requested interim relief and exercised the discretion to do so. The need to find a Board process interest requiring protection means that the determination in each case will be fact specific. The Board in the LIUNA 2004 case found a factual foundation supporting a finding it had its jurisdiction to grant interim relief based on two sets of facts. Firstly it considered the appointment of a Special Hearing Panel, "established very quickly and without regard for the Board's proceeding" (para. 65) as giving rise to concerns about interference with the Board hearing the section 96

application that had been brought by Local 183. The main application in that case was filed on October 3, 2003. After it was filed the LIUNA General President established the Special Hearing Panel (SHP) to deal with issues related to the subject matter of the application before the Board. SHP was to commence its hearings on November 24, 2003 and continue day to day. While this hearing schedule was subsequently amended after the Board issued its decision to grant interim relief without reasons the Board continued to be concerned about the impact of the parallel hearings on Local 183's ability to participate in matters before the Board.

22. The second factual foundation for the Board's LIUNA 2004 decision was the need to protect Local 183's ability to carry out its statutory obligation to bargain without the distraction of the Special Hearing Panel. The Board in this regard noted the submissions of the thirteen employer association who had intervened in support of this position. These employer organizations all were party to collective agreements with Local 183 and expressed concern about the impact of the actions of LIUNA on the ability of Local 183 to carry out its statutory obligation to bargain with them.

23. The facts before the Board in this case differ in significant ways from what was before the Board in the LIUNA 2004 case. Unlike the 2004 case the investigation that is the focus of this application was not initiated following the filing of an application. It has been ongoing since April 2009. It is not evident that it was initiated in a way that suggests it was an attempt to or will have the effect of interfering with Board proceedings.

24. The limited facts before me with regard to impact of the investigation on the ability of Local 183 to carry out its statutory obligation to bargain do not satisfy me that the investigation is likely to have any significant impact on the ability of Local 183 to function in that regard. The reason for the non-participation in this application by the thirteen employer organization which intervened in 2004 is not before the Board. Their absence nevertheless, makes the factual context of the issues relative to collective bargaining different than those faced by the Board in 2004.

25. The Board in the LIUNA 2004 decision had before it a set of facts that provided a foundation for jurisdiction to grant an interim order under section 98. In the instant application the facts are different and for the reasons outlined above in my view do not provide the necessary factual foundation for the Board to find that the interim orders requested are necessary to protect the Board's process.

26. The fact that the Board has concluded that this is not a case where it has jurisdiction to issue an interim order should not be taken as an indication one way or another of the likely outcome of the Main Application. At this point the Board has not heard the evidence or the parties' submissions in the Main Application. The considerations before the Board in this interim application are very different than those that will be before it in the Main Application. In this application the focus of the Board has been Section 98. In the Main Application the provision of other sections of the Act in particular section 149, are the focus of attention.

27. No party should be under the illusion that the Board in reaching this decision has not been concerned about certain aspects of what has been alleged in this application. In this regard I note in particular the facts alleged by applicant counsel in his letter of December 11, 2009 dealing with the alleged distribution of a letter from Mr. Bearse, LIUNA General Counsel. The applicant says that the letter was distributed at a Local 183 membership meeting on December 6, 2009. Based on the limited facts before me I have not been prepared to conclude that the letter's distribution gives the Board

jurisdiction to grant interim relief in order to protect the Board's process interest at this time. However, it should be evident to the parties and other persons that efforts to directly or indirectly engineer interference with the ability of Local 183 or its leadership to pursue its interests in the Main Application might cause the Board, in the appropriate case, to conclude that Board process interests are being affected in a way that gives it jurisdiction to grant interim orders to protect those interests. In the appropriate case the Board's interim relief power can be used to ensure that the elected leadership of a local continues to have access to the financial and other resources necessary to pursue matters before the Board if that is necessary to protect the Board's process interest. The instant application has been determined on the basis of the facts alleged at this time. The applicant is of course free to make another application in the event that circumstances change.

EXERCISE OF DISCRETION

28. Had I determined that in the facts of this case the Board had jurisdiction to grant interim relief under section 98 it would have been necessary for me to then consider those factors that go to the exercise of that discretion. Having concluded, however, that the facts before the Board do not support a finding that the Board has jurisdiction to grant interim relief, it is not necessary to consider those factors.

FURTHER PROCEEDINGS

29. Given the significance of the matters raised in the Main Application and the labour relations interest in having these matters resolved as quickly as possible the Board is satisfied that the hearing of the main application should be expedited. As a preliminary to dealing with the main application it is necessary to deal with the production requests made by counsel for the applicant in letters dated December 9 and 10, 2009. The responding parties had not responded to those letters as of the date of the consultation in this matter. The responding parties are therefore directed to:

1) advise of their position with regard to each of the production requests made in the December 9 and 10, 2009 letters;

2) indicate whether or not the responding party agrees to provide the particular material requested;

3) in the event that a responding party is not willing or able to provide the material requested the party is expected to indicate the reason they are unwilling or unable to provide the material;

4) where a responding party is not providing material they are simply to provide the reason for not providing without argument;

5) where any material requested is in the party's possession or under their control, provide an estimate of how long it will take them to provide the material, regardless of whether or not there is any dispute about providing the material;

6) provide their responses to the request for production to the Board and the applicant by 5:00 p.m. on January 12, 2010.

30. The Registrar will schedule a hearing to deal with any issues relating to production in the event that there are matters in dispute between the parties following receipt of the responding parties' response to the applicant's letters of December 9 and 10, 2009.

31. Having regard to the above the application for interim relief in Board File No. 2536-09-M is dismissed.

2388-09-U Universal Workers Union, Labourers International Union of North America, Local 183 on its own behalf and on behalf of its Members and Executive Board, Applicant v. **Labourers International Union of North America, Joseph S. Mancinelli, Ronald A. Pink, Q.C. and Cosmo Manella**, Responding Parties

Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Practice and Procedure – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

BEFORE: *Charles E. Humphrey*, Vice-Chair.

APPEARANCES: *Doug Wray, Jesse Nyman* and *Durval Terceira* for the applicant; *James Hayes, James Robbins* and *Elichai Shaffir* for Labourers International Union of North America, *Joseph S. Mancinelli*, and *Cosmo Manella; Sean McGee* and *Ronald A. Pink* for Ronald A. Pink, Q.C.

DECISION OF THE BOARD: February 22, 2010

1. This is an application under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The general nature of the dispute between the parties is described in the

Board's earlier decision relating to this matter and a request for interim relief in Board File No. 2536-09-M. The Board will not repeat that factual background for purposes of this decision.

2. This decision deals with a number of issues relating to the production of material requested by the parties. Counsel for the applicant Labourers' International Union of North America, Local 183 ("Local 183") has made requests for production to the responding parties Labourers International Union of North America ("LIUNA"), Joseph S. Mancinelli ("Mr. Mancinelli"), Cosmo Manella ("Mr. Manella") and Ronald A. Pink, Q.C. ("Mr. Pink"). The applicant's requests for production were made to responding parties' counsel in a series of letters dated December 9, 2009 (December 9 Letter), December 10, 2009 (December 10 Letter), February 2, 2010 (February 2 Letter). Counsel for the responding parties LIUNA, Mancinelli and Manella in a letter dated February 5, 2010 (February 5 Letter) requested production of material and particulars from the applicant.

3. In accordance with the direction of the Board in its January 5, 2010 decision counsel for the responding parties provided their clients' position regarding the disclosures requested in the December 9 Letter and December 10 Letter. At the hearing held on February 9, 2010 the Board heard the parties' submissions relating to the requests made in the December 9 Letter, December 10 Letter and February 2 Letter. Counsel for the applicant indicated he was not in a position to respond to the February 5 letter given the timing of its arrival. The issue of the response to that letter is dealt with below.

4. The Act gives the Board broad authority to require production of material and to consider evidence. Subsection 111(2) provides:

> Without limiting the generality of subsection (1), the Board has power,
>
> ...
>
> b) to require any party to produce documents or things that may be relevant to a matter before it and do so before ordering a hearing.
>
> ...
>
> e) accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not.

5. The Board has often expressed the "may be relevant" standard for production as a requirement to show that the material being requested is arguably relevant to an issue in the proceedings. The arguably relevant threshold is low as the Board put it in *NCI Ottawa Inc.*, [2006] CanLII 1589 (ON L.R.B.) at paragraph 10:

> The test for pre-hearing production is arguable relevance. That is, a party need only establish that a document or class of documents may have some significance in proving the case it seeks to present to the Board in order for those documents to meet the test of "arguable relevance". If a party can demonstrate some connection between the documents it seeks to have produced and its theory of the case, then that party will have established that those documents are arguably relevant and, subject to claims of privilege,

> ought to be produced for inspection. Thus, there is a low threshold for establishing arguable relevance.

6. The responding parties have claimed privilege from disclosure. In addition, they have argued that even if privilege does not apply the Board should exercise its discretion not to require disclosure of certain documents given the impact such disclosure would have on the current investigation being undertaken by Mr. Pink and the chilling effect such disclosure would have on the willingness of union members to come forward in future cases. That is they have asked the Board to weigh the benefits of disclosure against the harm that would be caused by disclosure in making any production order.

Privilege

7. The general principles outlined in the reasons of the Supreme Court of Canada in *A. M.* v. *Ryan*, [1997] 1 S.C.R. 157 are an appropriate starting point for the discussion of the application of privilege from disclosure. At paragraph 19 of its reasons the court said:

> The common law principles underlying the recognition of privilege from disclosure are simply stated. They proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth": *Trammel* v *United States*, 445 U.S. 40 (1980), at p. 50.

8. This Board like a court must have as its first concern ascertaining the truth to the best of its ability. As a general principle it is only where there is some public good which transcends this overriding concern with ascertaining the truth that the Board should consider declining to hear relevant evidence based on a claim of privilege.

9. In this case the responding parties have claimed privilege from disclosure on two grounds: solicitor-client privilege and informant privilege. Virtually all of the material over which privilege is claimed relates to information obtained by or created by Mr. Pink in the course of his investigation. Given this, it is necessary to consider Mr. Pink's role and the source and nature of his authority in order to put the claims to privilege from disclosure in context.

10. Since April 17, 2009 Mr. Pink has been conducting an investigation into the affairs of Local 183. As he put it in his letter of April 17, 2009, announcing the investigation, the investigation encompasses, "the entire functioning of Local 183". Mr. Pink is conducting the investigation in his role as Special Counsel – Canada (SCC) for the Labourers' International Union of North America. Mr. Pink derives his authority as SCC from the LIUNA constitution and the LIUNA Canadian Ethical Practices Code. The Ethical Practices Code describes function and authority of the SCC as follows:

> 10. (1) LIUNA shall engage the services of outside counsel, after consultation with the Canadian affiliates, highly regarded for his or her integrity, Canadian labour relations experience and diligence, to serve as the legal counsel to LIUNA while serving as the SCC under the provisions of this Code.

> (2) For the purposes of enforcing this Code, all of the investigative and prosecutorial powers described in the LIUNA Constitution, Uniform Local Constitution and Uniform District Council Constitution are hereby delegated to the SCC. The SCC may bring or prosecute charges for any conduct whether occurring before or after the adoption of this Code where the conduct in question is or was in contravention of the applicable standard of conduct in effect at the time of the alleged misconduct and which conduct is relevant to the continued performance of duties of any member, officer or representative. The SCC may bring or prosecute the aforementioned charges as a result of the charges filed with him, his own investigation or as a result of complaints made to him pursuant to Article 9 of this Code.
>
> (3) Pursuant to Article IX, Section 6 of the International Union Constitution, the General President may personally or through the SCC or his representative selected and designated by the SCC inquire and investigate into the manner in which the affairs are administered by subordinate bodies, their officers or members. He may also examine the books, records, papers, accounts, securities, purported agreements or understandings and any other documents in the custody of the said subordinate bodies or any officer, official, employee or member thereof and require personal appearance of any officer, official, employee or member as he, in the judgment of the SCC, may deem necessary to such investigation or inquiry. Before any inquiries are made of any officer, representative or member whose conduct is the subject of the complaint, the member shall be advised that he need not answer any questions, provided the member understands that the Canadian Hearings Officer may draw negative inferences from the refusal to respond, and that any statements made may be recorded in writing and offered in evidence at any subsequent hearing. All members shall have the right to be represented by counsel and to have a fair understanding of the nature of the examination which is to be conducted by the SCC.

11. The LIUNA constitution in section 6 of Article IX describes the investigative power of the General President, which are delegated to the SCC, under the Ethical Practices Code as follows:

> Section 6. The General President shall have the authority and power to investigate the affairs of a subordinate body when, upon information or complaint or when, in the General President's opinion, it is necessary to determine whether the affairs of a subordinate body or the activities of any of its officers or members are being conducted in violation of the Constitution.
>
> Pursuant to said authority, the General President shall have the power, either personally or through a designated representative to investigate and inquire into the manner in which the affairs are administered by the subordinate bodies, their officers or members and to examine the books, records, papers, accounts, securities, purported agreements or understandings or any other documents in the custody of said subordinate bodies or any officer, official, employee or member thereof and require personal appearance of any officer, official, employee or member as, in the General President's judgment, may be deemed necessary to such investigation or inquiry.

> In connection therewith, the General President may employ the services of a Certified Public Accountant or other services as the General President may deem advisable or necessary. After such investigation or inquiry, the General President shall take such actions as the General President may deem necessary or appropriate, including the temporary suspension of an officer or employee pending a hearing to be conducted within thirty (30) days before the General Executive Board on charges filed by the General President.

12. In considering the issues raised regarding disclosure of certain documents in this application it is also necessary to have regard to the statutory provisions under which this application has been made. The primary focus of the application is section 147 and 149 of the Act. These provisions are unique in that they give the Board a role in regulating, in certain circumstances, the treatment of a local union by its parent, that is a role in relating internal union affairs. Section 147 deals specifically with the alteration of the jurisdiction of a local union by its parent. Section 149 deals more generally with supervision, control or interference by a parent union relative to its local union. The provisions of sections 147 and 149 are also unique in that they relieve the Board from limitations contained in the union constitution in exercising its powers under sections 147 and 149. In the case of section 147, subsection (4) simply provides that the Board is not bound by the union constitution when applying this provision of the section of the Act. Section 149 provides that the Board shall consider the union constitution but is not bound by it. Both sections 147 and 149 impose a just cause standard on the treatment of a Local by its parent union. The Board's authority to regulate conduct under section 149 is reinforced by the provisions of subsection (4) which give it authority to make orders and give direction relating to the supervision, control or interference with the local by its parent even when the just cause standard has been met.

Solicitor-Client Privilege

13. The responding parties have claimed solicitor client privilege relative to some of the material which the applicant seeks to have produced. That is the claim is that there is a solicitor client relationship between Mr. Pink and LIUNA such that for example the bills for services rendered relative to his investigation of Local 183 are privileged and not subject to disclosure.

14. The Supreme Court of Canada in *Colleen Pritchard* v. *Ontario Human Rights Commission*, [2004] 1 S.C.R. 809 defined solicitor-client privilege in this way at paragraphs 14 and 15:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith* v. *Jones*, [1999] 1 S.C.R. 455, at para. 46.
>
> Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821, at p. 837, as: "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see *Solosky*, at p. 834.

15. In the Board's view the relationship which Mr. Pink has with LIUNA when he is conducting an investigation in his role as SCC does not attract solicitor-client privilege. This is so because in carrying out his activities, in the circumstances as they exist in this case, he is not giving legal advice but rather is conducting an investigation pursuant to authority delegated to him by the General President of LIUNA in accordance with the provisions of the LIUNA Constitution and Ethical Practices Code. That is, he is carrying out an investigative function of the General President that has been delegated to him, not acting as a solicitor. The comments of the Supreme Court of Canada in *Colleen Pritchard* in its discussion of the application of solicitor client privilege to in-house counsel, in the Board's view, apply to the relationship Mr. Pink has with LIUNA:

> 20. Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

16. The Ethical Practices Code describes Mr. Pink in his role as SCC, as occupying a position as legal counsel to LIUNA. That characterization of Mr. Pink's role, however, is not determinative. Whether or not he is in a solicitor-client relationship with LIUNA with regard to any particular activity or service he is providing to them depends on whether or not, amongst other things, it "entails the seeking or giving of legal advice". In this case Mr. Pink and LIUNA claim he is conducting an investigation independent of any direction from LIUNA. The activity in which he is engaged is a delegated investigative, information collection activity. Given this in the view of the Board, Mr. Pink is not giving legal advice to LIUNA nor has LIUNA sought legal advice from him relative to the issues under investigation. There may be many occasions when the interaction between LIUNA and Mr. Pink does attract solicitor-client privilege. In the Board's view, however, for the reasons indicated Mr. Pink's investigation of Local 183 is not one of those occasions.

Informant Privilege

17. Counsel for Mr. Pink argued that the Board should not order disclosure of material that would disclose the identity of persons who had provided information to Mr. Pink. Counsel approached this issue in two ways. First he argued that informant privilege founded on the four principles relating to privilege communication described in Wigmore on Evidence applied to prevent disclosure. Second, he argued in the alternative that even if the classic informant privilege does not apply the Board should consider the principles in Wigmore and the cases on informant privilege in exercising its discretion as to whether or not to order disclosure.

18. In discussing the foundation for communication or informant privilege the Ontario Court of Appeal in *Re Legislative Privilege*, (1978) 18 O.R. (2d) 529 commented as follows at paragraph 24:

> It is clear that the classes of evidence which give rise to privileged communications have foundations in social policy in which the general liability of every person to give testimony upon all facts inquired of in a Court gives way to more important social considerations: Wigmore on Evidence, McNaughton Revision (1961), vol. 8, p. 531, states:

> Looking back upon the principle of Privilege … four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation:
>
> (1) The communications must originate in a confidence that they will not be disclosed;
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
>
> These four conditions being present, a privilege should be recognized; and not otherwise.

19. Informant privilege based on the principles outlined in the quote from Wigmore has historically been extended to police informers and as the principle developed to communication with government and government officials. Protecting those who provide information to the police or government officials is in the view of the Board based on considerations that are not present in the case of an investigator conducting a private investigation under the terms of a union constitution. As the Court of Appeal indicates in *Re Legislative Privilege* determining when privacy will be applied to communication so as to exclude it from disclosure involves a resolution of the tension between the need to hear all relevant evidence in order that the court or tribunal can ascertain the truth and the need to give effect to "more important social considerations". That is it arises where the dichotomy is between truth-seeking and supporting "more important social considerations". It is the resolution of this tension that conditions 3 and 4 of the Wigmore analysis address.

20. The existence of "more important social considerations" is required for this dichotomy to be present. That dichotomy is evident when the choice is between the full disclosure and protecting society's interest in encouraging informers to give information to the police who are responsible for enforcing the law or in some cases government officials responsible for carrying out regulatory functions under a statute. It is in such cases where the presence of the competing "more important social consideration" is present, that based on the Wigmore analysis privilege may apply. In this case, however, it is not at all evident that protecting the identity of informants in a private investigation gives rise to a competing "more important social consideration" that can or should cause a tribunal to compromise the concern with ascertaining the truth. The manner in which a trade union chooses to regulate its internal affair is a private matter, involving private decisions, not a matter of broad public concern such as the apprehension of criminals. In this case what the responding parties are in effect asking the Board to do is to elevate protecting the identity of informants in a private process to the level of a "more important social consideration" in a way that risks diminishing the Board's ability to effectively carry out its statutory responsibility under sections 147 and 148 by potentially compromising its ability to ascertain the truth. In the Board's view acceding to such a request would not be consistent with an appropriate application of the principles outlined in the Court of Appeal's decision in *Re Legislative Privilege*.

21. In the Board's view the identity of informants or the information they have provided to Mr. Pink is not protected by communication or informant privilege. Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" such as to lead the Board to compromise the paramount concern with ascertaining the truth given its statutory mandate found in sections 147 and 149.

Exercise of Discretion

22. Even if the identity of informants is not protected by privilege should the Board exercise its discretion to prevent disclosure of their identity or information that would allow their identity to be ascertained? In the Board's view this would not be an appropriate exercise of the Board's discretion in the circumstances of this case. The Board is satisfied that given the nature of the allegations made in this case the identity of informants is arguably relevant. Given this and having regard to the nature of the inquiry contemplated by sections 147 and 149 the Board is not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained.

23. While the Board is not prepared to prohibit disclosure of the identity of persons who provided information to Mr. Pink this does not mean that the Board is not sensitive to the concerns raised by counsel regarding the potential negative effect of disclosure on Mr. Pink's investigation or the willingness of persons to come forward with information in the future. The processes for investigation and resolution of concerns or complaints regarding the functioning of local unions contained in the LIUNA constitution are worthy of protection. The Board recognizes the broad labour relations interest in fostering and supporting ethical practices within trade unions. The Board recognizes that disclosure of the identity of informants involves risks to the process and to individuals. The Board also recognizes that any safeguards it puts in place are likely to be less than a perfect solution to the concerns raised by responding party counsel. However, in the Board's view given its mandate under sections 147 and 149 and its concern with ascertaining the truth the safeguards outlined below are the best solution available to the concerns raised by the parties.

Conditions on Disclosure

24. The following shall apply to any documents of any kind which are disclosed to a party as a result of the disclosure orders contained in this decision:

> 1) A list will be prepared of the names of any individual informant that appears in any document. A number will be assigned to each person on that list. The term informant is intended to be applied in a broad sense to any union member who has provided information to Mr. Pink.
>
> 2) The names of any individual informant will be redacted from any document and replaced with the number assigned to them.
>
> 3) A copy of the list of names and numbers prepared in accordance with paragraph 1 above will be provided to each of the counsel to whom disclosure is made at the time documents are produced.
>
> 4) Counsel receiving any material to which paragraph 2 applies shall retain control over that material and any copies made of that material

and shall not allow any person to take copies of such documents out of counsel's control.

5) Counsel receiving any material to which paragraph 2 applies may review such material with their immediate client advisors in order to prepare their case and obtain instructions. This includes the disclosure of the names of informants contained on the list prepared in accordance with paragraph 1 above.

6) In the event that counsel considers it necessary to review the material to which paragraph 2 applies or to disclose the list prepared under paragraph 1 to any person other than their immediate advisors they shall advise the Board of the need to disclose the material, to whom it will be disclosed and why disclosure is necessary. The Board will deal with any such request on an expedited basis without a hearing.

7) At any hearing to deal with this application the informants will be referred to by the numbers assigned to them in accordance with paragraph 1 above.

Production Orders

25. In light of the Board's finding that privilege does not attach to the material that is the subject of the production request and the decision of the Board not to exercise its discretion to exclude material from the requirement it be produced the test to be applied to a request for production is arguable relevance. As the Board indicated in the *NCI Ottawa Inc.* case referred to above what is required to meet this test is some connection between the documents a party seeks to have produced and that party's theory of the case. Given this low threshold the Board is satisfied that the following production orders should be made.

26. With respect to the December 9 Letter, LIUNA, Mr. Mancinelli and Mr. Manella are ordered to produce the following:

(a) all correspondence (letters, e-mails and documents) sent from Mr. Mancinelli to Mr. Pink as Special Counsel Canada ("SCC") from October 2007 until the present relating to Local 183 and/or any of its Executive Board members;

(b) all correspondence (letters, e-mails and documents) received by Mr. Mancinelli from Mr. Pink from October 2007 until the present, and any reports or copies of reports relating to Local 183 and/or any of its Executive Board members;

(c) all correspondence (letters, e-mails and documents) sent from LIUNA to Mr. Pink as SCC from October 2007 until the present relating to Local 183 and/or any of its Executive Board members, including any enclosures and attachments;

(d) all correspondence (letters, e-mails and documents) received by LIUNA from Mr. Pink from October 2007 until the present, including any reports or copies of reports relating to Local 183 and/or any of its Executive Board members;

(e) all documents sent by Mr. Mancinelli to anyone concerning Mr. Pink's investigation into Local 183 and/or any of its Executive Board Members since October 2007 until the present;

(f) any documents received by Mr. Mancinelli from anyone, including anyone in LIUNA, concerning Mr. Pink's investigation into Local 183 and/or any of its Executive Board Members since October 2007 until the present;

(g) any documents in Mr. Mancinelli's possession, power or control relating to any complaint(s) by anyone against Local 183 or any member of its Executive Board from October 2007 until the present, including letters, e-mails or faxes or any other documents received by Mr. Mancinelli and any notes kept by Mr. Mancinelli of any such complaints, however received, whether in writing, orally or in person;

(h) any documents in LIUNA's possession, power or control relating to any complaint(s) by anyone against Local 183 or any member of its Executive Board from October 2007 until the present, including letters, e-mails or faxes or any other documents received and any notes kept by any LIUNA officer, official or employee of any such complaints, however received, whether in writing, orally or in person;

(i) any and all phone records from phones used or controlled by Mr. Mancinelli and Mr. Manella, including their business phone(s), cell phone(s), home telephone(s) or any other telephone that indicate calls made to or received by Mr. Mancinelli or Mr. Manella from October 2007 until the present. [Note: This order is made subject to appropriate arrangements being made to protect privacy and confidentiality interests of persons other than Mr. Manella and Mr. Mancinelli who may have used these phones. The Board expects counsel to deal with any issues relating to privacy or confidentiality of the conversation of members of Mr. Manella's or Mr. Mancinelli's households arising out of this order. The Board will deal with any issues the parties are unable to resolve];

(j) any retainer agreements or other agreements between Soave Strategy Group ("SSG") and LIUNA or any other entity entered into by Mr. Mancinelli; copies of bills sent to Mr. Mancinelli by SSG, including any documents itemizing the services provided; and any and all records of payment to SSG from October 2006 until the present;

(k) any invoices or bills sent to LIUNA relating to the investigation of Local 183 and/or any of its Executive Board members from October 2007 until the present, including a detailed breakdown of all fees and disbursements from Mr. Pink and any other persons retained by him;

(l) any diary or day-timer for both Mr. Mancinelli and Mr. Manella from October 2007 until the present; and

(m) any and all other documents arguably relevant to the issues involved in the two applications before the OLRB in the power, possession or control of LIUNA, Mr. Mancinelli and/or Mr. Manella, including all documents upon which they may rely.

Mr. Pink is ordered to produce the following:

(a) all correspondence (letters, e-mails and documents) received by Mr. Pink from Mr. Mancinelli from October 2007 until the present relating to Local 183 and/or any of its Executive Board members, including any enclosures and attachments;

(b) all correspondence (letters, e-mails and documents) sent by Mr. Pink to Mr. Mancinelli from October 2007 until the present, and any reports or copies of reports relating to Local 183 and/or any of its Executive Board members;

(c) all correspondence (letters, e-mails and documents) received by Mr. Pink from LIUNA (other than Mr. Mancinelli) from October 2007 until the present relating to Local 183 and/or any of its Executive Board members, including any enclosures and attachments;

(d) all correspondence (letters, e-mails and documents) sent by Mr. Pink to LIUNA (other than Mr. Mancinelli) from October 2007 until the present, including any reports or copies of reports relating to Local 183 and/or any of its Executive Board members;

(e) any documents in Mr. Pink's possession, power or control relating to any complaint(s) by anyone against Local 183 or any member of its Executive Board from October 2007 until the present, including letters, e-mails or faxes or any other documents received and any notes or recordings kept by Mr. Pink or anyone else acting under his direction or control concerning any such complaints, however received, whether in writing, orally or in person;

(f) Mr. Pink's complete file concerning his investigation as SCC into Local 183 and/or any of its Executive Board members from October 2007 until the present, including any and all letters, e-mails, faxes, notes of interviews, recordings, conversations, or meetings and reports received or sent or summaries received or sent and any and all other documents relating to said investigation;

(g) any and all phone records from phones used or controlled by Mr. Pink, including his business phone(s), cell phone(s), home telephone or any other telephone that indicate calls made or received by Mr. Pink to Mr. Mancinelli or received from Mr. Mancinelli by Mr. Pink from October 2007 until the present. [Note: This order is made subject to appropriate arrangements being made to protect privacy and confidentiality interests of persons other than Mr. Mancinelli. The Board expects counsel to deal with any issues relating to privacy or confidentiality. The Board will deal with any issues the parties are unable to resolve];

(h) all invoices or bills sent to LIUNA relating to the investigation of Local 183 and/or any of its Executive Board members from October 2007 until the present including a detailed breakdown of all fees and disbursements;

(i) any diary or day-timer entries from October 2007 until the present relating to LIUNA, Local 183, Mr. Mancinelli, Mr. Manella or the investigation of Local 183; and

(j) any and all other documents arguably relevant to the issues involved in the two applications before the OLRB in the power, possession or control of Mr. Pink, including all documents upon which he may rely.

27. With respect to the December 10 Letter, LIUNA, Mr. Mancinelli and Mr. Manella are ordered to produce the following:

(a) all other invoices or documents, written or electronic, in their possession or control related to payments made by all other LIUNA Local Unions, including all U.S. Locals, for all other investigations undertaken by LIUNA or Special Counsel since January 1, 2002;

(b) a copy of the written agreement between Mr. Weiss and LIUNA regarding his 'departure' as trustee of Local 183;

(c) all documents related to the "planned exchange" with labour groups in Italy in which Mr. Mancinelli was allegedly involved;

(d) all expenses and proofs of payment related to Mr. Mancinelli's trip to Italy to receive an honour bestowed upon him and his father;

(e) the submissions of every other LIUNA Local Union filed in response to LIUNA's jurisdictional review in 2007-2008;

(f) all reports, memoranda or other documentation, written or electronic, created as part of LIUNA's jurisdictional review in 2007-2008;

(g) all correspondence, written or electronic from LIUNA to any Local and between officers of LIUNA (including the SCC) related to LIUNA's jurisdictional review in 2007-2008 and any decisions reached or implemented as a result of said review;

(h) all documents, written or electronic, including reports and memoranda related to the alleged 'drastic decrease' in the number of LIUNA certification applications in September 2008;

(i) the minutes of all CECOF Board meetings from August to October, 2009;

(j) the Minutes from Mr. Mancinelli's business manager's meeting in October 2009;

(k) all evaluations of Mr. Routuhier, Mr. Traves and Mr. Davis;

(l) all notices of lay-off issued to any CECOF organizer in 2009.

Mr. Pink is ordered to produce the following:

(a) all invoices issued by Pink, Breen, Larkin to LIUNA or any of its affiliates related to Mr. Pink's "investigation" which is the subject matter of this application and all other documents relevant to establishing the costs of the "investigation" to date;

(b) a list of all Local Unions subject to investigation by LIUNA or Special Counsel since January 1, 2002;

(c) a copy of the written agreement between Mr. Weiss and LIUNA regarding his "departure" as trustee of Local 183;

(d) all documents related to the "planned exchange" with labour groups in Italy in which Mr. Mancinelli was allegedly involved;

(e) all correspondence, written or electronic from LIUNA to any Local and between officers of LIUNA (including the SCC) related to LIUNA's jurisdictional review in 2007-2008 and any decisions reached or implemented as a result of said review;

(f) all correspondence, written or electronic between Meyers Norris Penney and Pink Breen Larkin between March 2009 and the present and all reports, letters, invoices or other documentation, written or electronic, created by Meyers Norris Penney related to Mr. Pink's "investigation" of Local 183;

(g) all Notices to Investigate and Notices of Interview issued by Mr. Pink related to Mr. Pink's investigation of Local 183;

(h) all documents, written or electronic, including all notes, reports video and/or audio recordings created or obtained by Mr. Pink in any interview or meeting related to Mr. Pink's investigation of Local 183; and

(i) any letters, emails, video or audio recordings or any other documents received by Mr. Pink concerning the Applicant's membership meeting held on December 6, 2009 and any notes kept by Mr. Pink of any discussions with anyone concerning said meeting.

28. With respect to the February 2 Letter, LIUNA, Mr. Mancinelli and Mr. Manella are ordered to produce the following:

(a) any and all reports, memoranda, emails, notes, transcripts, recordings or documents, written or electronic, created in preparation for, during or following and related to, the meetings held on January 13, 15 and 27, 2009 referred to in Mr. Wray's letter of February 2, 2010 paragraph 39 of Further Particulars – Schedule "A" Amended.

Mr. Pink is ordered to produce the following:

(1) all complaints, reports, notes, transcripts, records, invoices or other documents including any invoices from Mr. Pink, LIUNA or third

parties retained by Mr. Pink to the subjects of the 'investigations', written or electronic, related to the following 'investigations' of Mr. Pink:

(a) Investigation of Mr. Mancinelli;

(b) Investigation of Mr. Manella;

(c) Investigation of Mr. Manuel Andrade;

(d) Investigation of LIUNA Local 1081;

(e) Investigation of LIUNA, OPDC; and,

(f) Investigation of Mr. Pat Little.

Timing of Production

29. The material which the parties have been ordered to produce shall be provided to counsel for the applicant no later than two weeks following the date of this decision. The timing of the production is based on estimates provided to the Board by counsel for the responding parties in earlier correspondence. If a party is unable to provide any part of the material within this time frame they are directed to so advise the Board and applicant counsel promptly indicating the reason for the inability to meet the deadline and the date the material will be made available. The Board will deal with any issues relating to the timing of production on an expedited basis.

30. In the event that there are issues arising out of the implementation of these production orders the parties are to promptly advise the Board of the nature of the issue, the proposed resolution and any submissions the parties wish to make as to the decision the Board should make. The Board will deal with such issues on an expedited basis.

31. The Board recognizes that counsel have advised that a number of the requests for production describe material which either does not exist or is not in the possession of the party to whom the request has been made. In most cases that will be a complete answer to the production request. The Board has included these requests in the production orders in order to ensure that there is no misunderstanding about parties' obligation to produce such material if it does exist.

Use of Material Disclosed

32. The Board wishes to emphasize that as in all cases the material which the Board has directed be disclosed is only to be used for purposes of this litigation and no other purpose. All parties are expected to strictly comply with this limitation on use. The Board also wishes to emphasize to all parties its expectation that the disclosure it has ordered will not result in any inappropriate actions being taken against any individual who has provided information or assistance to Mr. Pink. We are confident Mr. Pink and party counsel will make their best efforts to ensure that does not occur.

February 5 Letter - Production

33. Counsel for LIUNA, Mr. Mancinelli and Mr. Manella made a request for production and particulars to the applicant by way of a letter dated February 5, 2010. At the hearing on February 9, 2010 counsel for the applicant indicated that given the timing of receipt of the letter he had not had an opportunity to consider its contents. As a result, the Board has not dealt with the counsel's request for production and particular. In order to expedite matters the Board directs the following:

> 1) Counsel for the applicant will provide a response to the February 5, 2010 letter within five (5) days of the date of this decision. Counsel will indicate in the letter what material and particulars his client is prepared to provide and what material and particulars it is unable or unwilling to provide. Counsel will indicate why his client is unable or unwilling to provide the material or particulars and make any submission he wishes to make regarding the conclusion the Board should make regarding the disputed request.
>
> 2) Counsel for LIUNA, Mr. Mancinelli and Mr. Manella will provide his response to counsel to the applicant's submissions within five (5) days of receiving those submissions.
>
> 3) Counsel for the applicant will provide his reply to the submission of the counsel for LIUNA, Mr. Mancinelli and Mr. Manella within five (5) days of the receipt of reply.
>
> 4) The Board will decide the issues based on the written submissions of the parties.

Pleadings

34. In order to facilitate the hearing of this matter, the Board directs the following:

> 1) Within ten (10) days of the date of this decision the applicant shall file with the Board and provide copies to the other parties of consolidated pleadings incorporating the pleadings contained in the original application with material pleaded in subsequent correspondence, such pleadings will be in consecutively numbered paragraphs.
>
> 2) Within ten (10) days of the receipt of the consolidated pleadings from the applicant counsel for LIUNA, Mr. Mancinelli, Mr. Manella and Mr. Pink shall file with the Board and provide copies to the other parties a consolidated response containing a response to the consolidated pleadings. Such response shall be in consecutively numbered paragraphs.

Scheduling

35. At the hearing on February 9, 2010 the parties discussed issues relating to a hearing scheduled for this matter. The parties indicated that they would prefer that the Board schedule a day

for dealing with issues relating to the hearing process sometime in advance of the commencement of the hearing. Such day to be scheduled after production is made in compliance with any directions made in this decision. The parties indicated that they expected that the litigation of this matter would require 12 hearing days. In order to facilitate scheduling the parties are directed to advise the Registrar of their availability between March 15 and June 18, 2010 within five (5) days of the date of this decision. Given the number of hearing days required and the number of counsel involved, the parties should recognize that the Board may find it necessary to schedule hearings on days other than those provided by counsel.

Process Issues

36. The Board is conscious of the need for the litigation in this matter to proceed as expeditiously as possible. The issues raised in this litigation have the potential to affect not only the parties but those who deal with the parties in the construction industry. In addition, the Board has an obligation to use its resources effectively and efficiently. In furtherance of these objectives it is the Board's view that it is appropriate to take initiatives that attempt to streamline the litigation of this matter. In particular, the Board is interested in reducing the need to hear oral evidence on issues over which there is not any dispute or which will not affect the outcome. The Board therefore is considering requiring the following:

> 1) The applicant prepare a will say statement for each witness they intend to call describing in consecutively numbered paragraph what evidence will be given by that witness. Such will says to be provided to the Board and other parties within ten (10) days of the date that disclosure is provided under the terms of this decision.
>
> 2) The responding parties prepare a will say statement for each witness they intend to call describing in consecutively numbered paragraphs what evidence will be given by that witness. Such will say statements to be provided to the Board and other parties within ten (10) days of the date that the responding parties receive the will say statements from the applicant.

37. The Board would have regard to the will say statements in determining what evidence it considers necessary to hear in order to determine the issues in this matter. Before making a decision on whether or not to proceed in this way, the Board will consider comments from the parties regarding the use of such a process including any other suggestions the parties may have to improve the efficiency of the hearing process in this matter. Any such comments are to be provided to the Board within five (5) days of the date of this decision.

3325-04-HS; 0284-05-HS Ministry of Health and Long-Term Care, Land Ambulance Programs, Applicant v. Canadian Union of Public Employees Local 2974.1 and R. Taggart, Inspector, Responding Parties v. County of Essex-Windsor, Intervenor; Canadian Union of Public Employees Local 2974.1, Applicant v. Ministry of Health and Long-Term Care, and R. Taggart, Inspector, Responding Parties v. County of Essex-Windsor, Intervenor

Employee – Employer – Health and Safety – These applications concern the health and safety of paramedics (employees of Essex represented by CUPE) in relation to communications systems which the MOHLTC has the sole and exclusive responsibility to provide and operate – There were six issues over which Essex and CUPE disagreed with the MOHLTC: the need for a second portable radio on an ambulance crew so that both crew members would have a portable radio; testing emergency buttons on the radios; preventative maintenance of the radios; flagging of potentially dangerous addresses; mike to mike functions on cell phones; and information on defects in the system – The Board reviewed the factual context, the hazards faced by paramedics, and the MOHLTC's role with respect to the provision of ambulance services in Essex – The Board found that while MOHLTC was not the employer of the paramedics, it did have some of the obligations of an employer under the OHSA to the paramedics – The Board found a high level of integration between the communications and dispatch functions performed by the MOHLTC and the service functions performed by Essex – The Board noted that the paramedics were under the constant direction and control of [MOHLTC's] Central Ambulance Communication Centre from the beginning to the end of their shifts – After an extensive review of the case law, the Board found the integration of these systems was sufficient to impose upon the MOHLTC some of the obligations of an employer in relation to the paramedics–given that the contiguous sphere of operations with Essex meant that MOHLTC's activities could pose a risk of harm to the paramedics – Alternatively the Board found the MOHLTC, although a non-natural person, could be a supervisor under the Act, and given the authority (complete and exclusive control over the communications system it requires the paramedics to use) it exercised over the paramedics, it was their supervisor – The Board went on to find that the MOHLTC did breach certain obligations with respect to the six issues as an employer (and alternatively as a supervisor) in relation to the paramedics with respect to the communications systems – Declarations, orders and directions made

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Lorne Richmond* and *Dave Thibodeau* appeared on behalf of Canadian Union of Public Employees Local 2974.1; *David Strang, Allan Duffin* and *Rick Smiles* appeared on behalf of the Ministry of Health and Long-Term Care; *Giuseppe Ferraro* and *Rick Taggart* appeared on behalf of R. Taggart, Inspector; *Jacqueline Lund, Brian Bildfell* and *Dean Wilkinson* appeared on behalf of the County of Essex-Windsor.

DECISION OF THE BOARD: February 26, 2010

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Appendix "A", Statutory Provisions

Introduction

1. These are two applications under section 61 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended ("OHSA").

2. These applications are with respect to the health and safety of paramedics in relation to the operation of the communications system which they are required to use. The paramedics are

employees of the County of Essex-Windsor ("Essex") and are represented in that employment relationship by the Canadian Union of Public Employees, Local 2974.1 ("CUPE"). It is common ground that pursuant to the *Ambulance Act*, R.S.O. 1990, c. A.19, as amended, sole and exclusive responsibility for the provision and operation of the communications system lies with the Ministry of Health and Long Term Care ("MOHLTC").

3. While I have adopted the parties' practice of identifying the MOHLTC as a party to these proceedings, it appears to me that the proper party is in fact the Crown in Right of Ontario. References to the MOHLTC should, therefore, be understood to be a reference to the Crown in Right of Ontario for the purposes of this decision.

4. Essex and CUPE consider the current communications system to be unsafe in several respects, to be detailed below. The MOHLTC has declined to make changes requested by Essex and CUPE, and refuses to permit Essex to make some of the changes on its own. The Inspector first made an order directing the MOHLTC to do so and then rescinded much of that order. The MOHLTC appeals the initial making of the order. CUPE and Essex appeal the rescission of the order.

5. Essex and CUPE assert that in relation to the provision and operation of the communications system used by the paramedics the MOHLTC has breached the obligations of an "employer" under section 25(1)(b), (2)(a) and (h) of the OHSA, the obligations of a "supervisor" under section 27(2)(a) and (c) and the obligations imposed on certain suppliers under section 31(1) of the OHSA. "Employer" and "supervisor" are defined terms under the OHSA. The relevant sections of the OHSA are set out in Appendix "A" to this decision.

6. The MOHLTC concedes that it is an employer within the meaning of the OHSA but denies that it is an employer of the paramedics, or that it is a supervisor. It concedes that it is a supplier of the communications system. It denies, in any event, that the communications system it has provided or its manner of operating that system poses any health and safety risk in general to the paramedics and in particular breaches any obligation it has as a supplier or would have if it were an employer or supervisor.

7. At the conclusion of the hearing, the Inspector argued that MOHLTC was an employer within the meaning of the OHSA, but not a supervisor. The Inspector argued that the MOHLTC had, as an employer, in some respects breached its obligations under the Act.

8. The hearing of this matter took 14 hearing days, in addition to several days spent in consensual mediation efforts, over the course of several years. The parties led evidence with respect to events that post-dated the applications without objection. By the conclusion of the hearing, CUPE and Essex had abandoned some remedial requests and redefined others. This appears to arise from two things. First, some of the problems which they had sought to address arose during the transition from the old communications system to the current communications systems and have since been resolved. Second, a greater understanding of the technological capabilities and limitations of the current system obtained through the course of the hearing. In the result, there were few material facts in dispute between the parties. Accordingly, the facts recited in this decision are not in dispute unless otherwise indicated.

9. Broadly speaking, the MOHLTC's sole and exclusive responsibility for providing the communications systems used by the paramedics gives rise to six issues over which the parties continue to disagree:

> a) The refusal of the MOHLTC to change the "scale of issue" of portable radios to paramedics from one per ambulance, each ambulance having a crew of two paramedics, to one per paramedic while on duty (referred to by the parties, and in this decision, as the "second portable" issue);
>
> b) The basis and frequency on which the emergency buttons on the portable radios used by the paramedics should be tested, with the result that there is no regular testing of the buttons;
>
> c) The refusal of the MOHLTC to permit its dispatchers to "flag" for paramedics addresses to which they are being dispatched as "known" to have potentially dangerous residents;
>
> d) The lack of a preventative maintenance program by the MOHLTC for the communications equipment it supplies to paramedics for their use;
>
> e) The functionality of the communications system provided by the MOHLTC to the paramedics, in relation to which CUPE and Essex now seek declarations and orders requiring the MOHLTC to inform the paramedics of known "defects"; and
>
> f) The refusal of the MOHLTC to permit paramedics to use the "mike to mike" function on cell phones provided to them by the MOHLTC.

10. The parties called evidence through the following witnesses. CUPE called: Dean Wilkinson, Operations Manager for Essex-Windsor Emergency Medical Services; and Dave Thibodeau, a paramedic who had worked for Essex for 18 years as of the date of his evidence and who was, and had been, a worker Health and Safety representative on behalf of CUPE. Essex called: Brian Bildfell, Director of Land Ambulance Services, County of Essex-Windsor and City of Windsor. The MOHLTC called: Rick Smiles, Manager of Telecommunications Section, Health Services Cluster, IT Services, Management Branch, MOHLTC; Matt Landry, Supervisor for Communications, Windsor Central Ambulance Communication Centre ("Windsor CACC") (and as such a member of a bargaining unit of employees represented by OPSEU); Lou Battiston, Acting Deputy Director, Government Mobile Communication Project ("GMCP"); Beth Krauter, Manager of Windsor CACC; and Allan Duffin, Field Manager, Southwest Field Office, Emergency Medical Services Branch, MOHLTC. The Inspector called no witnesses. All of the witnesses gave their evidence in a straightforward and candid manner, to the best of their ability given their knowledge and expertise.

Historical Context

11. Prior to 1998 ambulance services were operated directly by the Province of Ontario. In 1998 responsibility for the provision of ambulance services, apart from the communications functions, was downloaded to upper tier municipalities ("UTMs") by the Province. Staff and

equipment were transferred from the Province to UTMs, including Essex. As a result, Essex employs approximately 150 full time and part time paramedics and supervisory staff. It has 4 ambulance stations and 28 vehicles. It responds to approximately 50,000 calls per year.

Hazards Faced by Paramedics

12. The issues in dispute are seen by CUPE and Essex as responsive to certain hazards faced by the paramedics. It is useful, therefore, to review at the outset the nature of those hazards.

13. In the County of Essex-Windsor, approximately 90% of the calls responded to by paramedics relate to emergencies. These may be the result of illness or trauma from motor vehicle accidents, industrial accidents, other accidents or acts of violence. A significant number of the calls involve mental health issues. The paramedics may have little or no information about the nature of the problem or any attendant risks to their health and safety prior to arrival. (The amount of information provided to paramedics relates to one of the issues in these proceedings: flagging.)

14. Wilkinson (who gave his evidence in 2007) provided anecdotal evidence with respect to some potentially dangerous situations in which paramedics have found themselves. Paramedics were dispatched to a house where a female was having a seizure. The patient refused transport by the paramedics but her condition was such that the paramedics remained at the scene. Only upon the arrival of six police cruisers did the paramedics in question learn that the residence was owned by a notorious motorcycle gang. Weapons were located in the residence, including a knife under a pillow under the patient and a handgun in a wooden box on a coffee table next to the patient.

15. In 2006, paramedics were dispatched to a patient having a seizure on the street. The patient was placed in the ambulance where the paramedics attempted further treatment. The patient became violent. An emergency button in the ambulance was set off. Other ambulance crews arrived. It took five paramedics to restrain the patient. During transport the patient bit one of the paramedics.

16. Also in 2006, paramedics were dispatched to a residence where a patient was having abdominal pain. The patient met the crew in the street and was placed in the back of the ambulance for assessment. During the assessment, two police officers knocked on the rear door of the ambulance and asked the paramedics to which address they were responding. When the paramedics told the police officers, the police officers told the paramedics that in no circumstances were they to respond to that address in the future without police presence, as the residence in question was known to be a "crack house" at which there were known to be weapons. (Essex requested that MOHLTC "flag" this address, a concept discussed further below, but the request was denied.)

17. A report with respect to an incident in January 2002, under the previous radio communications system, was placed into evidence. Two paramedics were attending to an individual who appeared to be intoxicated and was subsequently found to be in possession of a quantity of crack cocaine. The paramedics decided to attempt to contact the Windsor Police Department using their portable radio. They were told that their attempted radio communication was unintelligible. One returned to the ambulance to use its radio. When he returned, he learned that there had been a scuffle between his partner and the patient. A further attempt to use the portable was also unsuccessful.

18. The incident which gave rise to the orders which are the subject of this application occurred on February 27, 2004. Incident reports filed by the ambulance crew involved were filed as

exhibits, and additional evidence was given by Wilkinson and Thibodeau. An ambulance crew was dispatched to an address to attend to a patient with mental health problems. The police had also been dispatched to that address, but for reasons which were not before me that dispatch was cancelled. By the time the crew arrived, the patient had become agitated and drew a knife on them. The crew retreated to the ambulance where they locked the doors and awaited the arrival of the Windsor police. The attending crew experienced difficulties in using their portable radio: there was no available channel, and they received a "bonk" signal (discussed further below). At the time of the incident FleetNet, which is the current communications system and is described in greater detail below, was still being rolled out in Essex and the emergency buttons on the portable radios had not yet been made operational.

19. In cross-examination, Wilkinson agreed that there is nothing to suggest that the ambulance crew members became separated during this incident. Thus, while this incident is some evidence of the hazards faced by paramedics in the course of their duties, and of the utility of a functioning portable radio and emergency button, it is less clear that it supports the need for both members of an ambulance crew being provided with their own portable radio.

20. Thibodeau, who has worked as a full time paramedic since 1989, testified that he has always responded to calls involving domestic violence, public violence, assaults, weapons, street fights and drunks, but the frequency of such calls is increasing. He testified that paramedics now respond to such calls on a daily basis. Further, he testified that two members of a paramedic crew becoming separated is not a chance event but rather a daily occurrence.

21. Thibodeau described an incident in which he and his partner were dispatched to a house where a couple had been arguing. The husband was unconscious with signs of a severe head injury, apparently as a result of the wife cracking a large crystal vase on his head. Thibodeau's partner, who was carrying the portable radio at the time, left the house to return to the ambulance for additional equipment. While Thibodeau was on his knees attending to the patient, the wife, who was drunk, started throwing items from a kitchen drawer at Thibodeau's back. One of the items thrown was a large kitchen knife. Thibodeau left the patient to restrain the wife until his partner returned. In cross examination he agreed that an emergency button would not have prevented the knife being thrown.

22. Incident reports in relation to an incident on September 2, 2007 were also placed into evidence and Thibodeau gave evidence with respect to discussions he had with one of the paramedics involved. A crew of paramedics was dispatched to an address. The patient was agitated and being held to the ground by family and friends. The paramedics were able to calm the patient, place him on a stretcher and move him to the back of the ambulance. After several minutes the patient suddenly became very agitated which quickly progressed to violence: the glasses of one paramedic were knocked off his face and destroyed and the other paramedic was kneed and kicked at a number of times. The paramedic with the portable was ultimately able to push an emergency button. The other paramedic did not have access to an emergency button or a radio by which he could convey additional information about the situation to dispatch. Police arrived some minutes later and the patient was subdued.

23. Wilkinson, who has over 37 years experience in provision of ambulance services, testified that it was common, on a daily basis, for the two members of a crew to become separated. As examples he listed motor vehicle accidents in which one crew member is attending to individuals on one side of an expressway and the other is attending to individuals on the other and dispatches to

apartment buildings, where one crew member must return to the ambulance to retrieve some required piece of equipment. He also asserted that scuffles or fights with patients were becoming a daily occurrence in Essex-Windsor. This evidence was not challenged in cross-examination.

24. Landry testified as to one such incident involving a real emergency. A paramedic crew at the Windsor Casino was dealing with a patient who was reacting in an aggressive manner due to a diabetic incident. The crew hit the emergency button on the portable multiple times. The signal was relayed to dispatch by 4 or 5 different mobile/repeaters. The dispatcher canvassed all potentially affected ambulances. Two crews did not respond: the one at the Casino and one at a residence. Police were dispatched to both the Casino and the residence.

The MOHLTC's Role with respect to the Provision of Ambulance Services in Essex

25. Pursuant to the *Ambulance Act*, and regulations thereto, the MOHLTC performs essentially three types of functions in relation to the ambulance services provided by Essex: regulatory, funding and operational.

26. Certain provisions of the *Ambulance Act* are of particular note. Section 2 provides that the Minister of Health is responsible for the administration and enforcement of the Act. Section 4 gives the Minister the duty and the power "to ensure the existence throughout Ontario of a balanced and integrated system of ambulance services and communications services used in dispatching ambulances" (s. 4(1)(a)). The obligation to provide land ambulance services, however, is placed on UTMs by section 6(1) of the Act.

27. Section 4(3) of the *Ambulance Act* enables the Minister to make grants for the provision of services under the Act. As discussed in greater detail below, in order to be eligible for a grant, a UTM must meet certification criteria established by the MOHLTC. The MOHLTC funds approximately 40% of the cost of Essex's ambulance services.

28. The certification criteria for emergency medical service operators established by the MOHLTC pursuant to Part II of O. Reg. 257/00 to the *Ambulance Act* are set out in the Land Ambulance Service Certification Standards. They are comprehensive and include determination of whether or not the operator has in place policies covering the recruitment of staff, rest periods between the hours worked by staff, transportation of patients by staff, requiring staff to wear seat belts, and interactions with the CACC. Essex is subject to these criteria.

29. The Minister is given specific duties and powers in relation to those ambulance services. In particular, the Minister has the duty and power "to establish standards for the management, operation, and use of ambulance services and to ensure compliance with those standards" (s. 4(1)(d) of the *Ambulance Act*) and "to monitor, inspect, and evaluate ambulance services and investigate complaints respecting ambulance services" (s. 4(1)(e)).

30. Pursuant to the authority to establish standards, and Part II of O. Reg. 257/00, the Minister has promulgated a document entitled "Ambulance Service Patient Care and Transportation Standards". That document mandates standards with which each emergency medical service operator, and each emergency medical attendant and paramedic employed by the operator, are required to comply. (Emergency medical attendants and paramedics have different levels of qualification. The distinction is not relevant to the issues in this case and in the balance of this

decision I have, as did the parties, used the term paramedic generically to refer to both.) Those standards specify the staffing levels of ambulances, the qualifications required to be held by ambulance staff and requirements for continuing education of paramedics. They prohibit smoking or the use of alcohol or drugs which might impair the function of paramedics. They also specify detailed required procedures with respect to communicable disease management and influenza control. Finally, those standards also require each paramedic to comply with directions of communications officers employed by the MOHLTC with respect to the assignment of calls and the transportation of patients to facilities.

31. While Essex decides whom to hire as a paramedic, before the individual can begin to work a paramedic photo ID card must be issued by the MOHLTC. Prior to doing so, the MOHLTC reviews documentation concerning the individual submitted by Essex and conducts a criminal record and driver's licence check. The photo ID card is unique to Essex: if the paramedic works for another emergency medical service provider, another photo ID card must be obtained from the MOHLTC in relation to that work.

32. The communications and dispatch functions performed by the MOHLTC lie at the heart of the present applications. Pursuant to section 4(1)(c) of the *Ambulance Act*, the Minister has the duty and the power "to establish, maintain and operate communications systems, alone or in co-operation with others, and to fund such services". Thus, in providing communications and dispatch equipment and services to UTMs, the MOHLTC is performing an operational function.

33. I note, parenthetically, that while it is common ground that the MOHLTC's responsibility with respect to communications and dispatch functions is sole and exclusive, the statutory or regulatory basis for this conclusion was never made clear. I do note that section 13 of O. Reg. 257/00 to the *Ambulance Act* provides:

> If the operator of a land ambulance service also operates a communications service, the operator shall, on receiving notice from the Director, cease operating the communications service and shall,
>
> > (a) permit Ministry officials to do all things reasonably necessary to transfer control of the communications service to a new communications service;
> >
> > (b) ensure that all telephone numbers under the operator's control that are used to receive ambulance calls from the public or other agencies are assigned to the new communications service;
> >
> > (c) ensure that no other telephone lines under the operator's control are used for assigning calls to ambulances or emergency response vehicles; and
> >
> > (d) not advertise or hold out to the public any telephone number as being available to access ambulance or emergency response services except those assigned to the new communications service.

In any event, I have assumed for the purposes of these reasons that the MOHLTC has sole and exclusive authority in relation to communications and dispatch functions used by emergency medical services in the Province of Ontario. I turn now to a brief description of those functions.

34. Communications officers employed by the MOHLTC receive calls and dispatch Essex's paramedics to attend to those calls. The paramedics are under the direction and control of the communications officers from the beginning to the end of their shifts. In part, these interactions are governed by the "County of Essex, Emergency Medical Services, Deployment Plans", as discussed further below. These interactions relate not only to the one to two hundred calls that are dispatched per day, but to other communications relating to things such as the positioning of ambulances and the taking of breaks. As noted above, the paramedics are required to comply with the directions of the MOHLTC communications officers.

35. The MOHLTC determines what information will be given to the paramedics in relation to those calls. In particular, as discussed further below, the MOHLTC refuses to "flag" addresses "known" to have potentially dangerous residents, and to provide this information to the paramedics.

36. The radio communications system currently provided by the MOHLTC is commonly referred to as FleetNet. The system was designed to specifications of the MOHLTC, and its partners in the Government Mobile Communications Project as discussed further below. FleetNet is large and complex and its technical capabilities and limitations are within the knowledge and control of the MOHLTC.

37. The MOHLTC determines what communications equipment is provided to the paramedics in relation to the performance of their duties. Of particular note in relation to this case, the MOHLTC has decided that the scale of issue of the portable radios provided for use by the paramedics will be one portable radio per ambulance. As each ambulance has a crew of two paramedics, this means that there is only one portable radio for them to share when outside of the ambulance. Repeated requests by Essex for a second portable radio per ambulance, and even offers by Essex to pay for such a radio, have been refused by the MOHLTC.

38. The MOHLTC also provides each crew of paramedics with a cell phone. This practice originated under the previous radio communications system and was designed, in part, to address "dead spots" in its coverage. However, as discussed further below, the cell phones are not a substitute for the portable radios, but serve a separate function. The decision as to whether or not to continue to provide the cell phones lies with the MOHLTC.

39. The MOHLTC also determines the manner in which the communications equipment it provides may be used. Of particular note, the agreement of the MOHLTC is required before the paramedics can test the emergency buttons on their portables. Thus far, the MOHLTC and Essex have not been able to reach an agreement on this issue, with the result that there is no regular testing of the emergency buttons on the portables. The MOHLTC has also set up the cell phones so that they may only be used to call pre-programmed numbers and has disabled the "mike to mike" function, by which one of the paramedics' cell phones could be used to call another.

Whether the MOHLTC has obligations under the OHSA of an "employer" to the paramedics.

Summary of the Parties' Arguments

40. CUPE asserts that the MOHLTC is an employer of the paramedics for the purposes of the obligations under sections 25(1)(b) and 25(2)(a) and (h) of the OHSA, or in any event has those

obligations to them, and that it has breached those obligations in relation to the paramedics employed by Essex.

41. CUPE argues that Essex and the MOHLTC would be declared to be a common employer within the meaning of section 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, Sch. A, but for the provisions of the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38, ("CECBA") which provide that section 1(4) does not apply. It notes, however, that there is nothing in CECBA which ousts the application of the OHSA. It invites the Board to conclude that the MOHLTC is a common employer with Essex for the purposes of the OHSA.

42. CUPE argues that the MOHLTC employs one or more persons and therefore falls within the meaning of "employer" as defined by section 1(1) of the OHSA. It argues that the obligations which attach to an employer under section 25 of the OHSA relate not only to its own workers but the workers of other employers. It notes that the section refers to obligations which an employer has to "workers", not to "its workers". It argues that when the Legislature intended the obligations of a party to be so restricted it said so. It points to section 46 of the OHSA, which refers to "a constructor's or employer's workers". It argues that an employer of workers at a workplace is subject to obligations under the OHSA to ensure the safety of all workers at the workplace, citing: *R. v. Skyway Equipment Co.*, [1997] O.J. No. 6074; *R. v. Wyssen*, (1992) 10 O.R. (3d) 193 (C.A.); *R. v. Structform International Ltd.*, [1992] O.J. No. 1711; *R. v. Grant Forest Products Inc.*, [2002] O.J. No. 3374, affirmed [2004] O.J. No. 2250; *Ontario (Ministry of Labour) v. Pioneer Construction Inc.*, (2006), 79 O.R. (3d) 641; *Tembec Forest Products (1990) Inc.*, [1994] O.O.H.S.A.D. No. 3 (February 3, 1994); and *K. Winter Sanitation Inc.*, [1999] OLRB Rep. March/April 219 (April 28, 1999). The workplace of the paramedics, it argues, includes the dispatchers employed by the MOHLTC. It notes that the Court of Appeal has held that the OHSA is remedial legislation which should be interpreted in a generous manner consistent with its purpose of protecting the safety of workers: *Ontario (Ministry of Labour) v. Hamilton (City)*, (2002) 58 O.R. (3d) 37.

43. Essex argues that the MOHLTC exercises significant control over the ambulance services in general, and the employment of paramedics by the ambulance services in particular, and that it has complete control over the communications system. Essex notes that the OHSA binds the Crown. Essex notes that there is a statutorily mandated agreement between itself and the MOHLTC and argues that this constitutes the MOHLTC an employer within the meaning of the OHSA, relying on *R. v. Nova Scotia (Department of Supply and Services)* [1997] N.S.J. No. 496 (N.S. Prov. Court) and *Bell v. Quagliotti* [1918] B.C.J. No. 114 (B.C.S.C.). Essex concedes that there is nothing in the definition of employer under the OHSA which specifically addresses the issue of "downloading", but cites *R. v. 974649 Ontario Inc. c.o.b. as Dunedin Construction (1992)*, (2001) 206 D.L.R. (4th) 444 (S.C.C.) for the proposition that the law speaks continually once adopted with the result that the will of the legislature must be interpreted in light of prevailing rather than historical circumstances. It also argues that as the MOHLTC is an employer and the paramedics are workers, the MOHLTC is subject to the provisions of the OHSA in relation to the paramedics, relying upon *R. v. Iroquois Falls Hydro-Electric Commission*, unreported, December 19, 2001, O.C.J.

44. The Inspector also argues that the MOHLTC ought to be considered an employer with respect to the health and safety of the paramedics, but disagrees with some of the arguments advanced by CUPE and Essex. Specifically, the Inspector argues that the functions of the MOHLTC pursuant to the *Ambulance Act* and Regulations thereto are those of a regulator, and do not constitute it an employer of the paramedics. In this respect it cites *Abarquez v. Ontario*, [2005] O.J. No. 3504. The

Inspector argues, however, that the MOHLTC is an employer in its own right and as such is responsible to comply with the OHSA in relation to the work carried out by workers of other employers, if the work of the other employers is contiguous or contingent upon the MOHLTC performing its work in accordance with the OHSA. In support of this proposition, it relies upon *Iroquois Falls, R. v. London Excavators & Trucking Ltd.*, [1998] O.J. No. 6437 (C.A.), *Wyssen* and *Structform International Ltd.*

45. The MOHLTC argues that it does not have the responsibilities of an employer under the OHSA *vis a vis* the paramedics, and that this makes good policy sense. The contrary conclusion, it asserts, would mean that an Inspector under the OHSA addressing the local demands in one upper tier municipality could make orders which would have negative health and safety consequences for the complex province wide communications system as a whole. It argues that its functions under the *Ambulance Act* and Regulations thereto are those of a regulator and do not constitute it an employer. It disputes that it has any supervisory authority over the paramedics. While it is an employer in its own right, and it supplies services to the paramedics, it argues that in order to have the responsibilities of an employer *vis a vis* the paramedics, it would have to supply services of one or more of its workers in the workplace of the paramedics. It argues that this proposition is supported by the case law and cites *K. Winter Sanitation*, *Wyssen* and *Pioneer Construction*. *Iroquois Falls*, it argues, is limited to instances in which the work is physically contiguous.

Analysis

46. The interpretative approach to be applied to the OHSA has been stated by the Ontario Court of Appeal in *Hamilton (City)*, (2002) 58 O.R. (3d) 37 as follows (at paragraph 16):

> The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

47. Section 1(1) of the OHSA defines "employer" as follows:

> "employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services

48. There is no dispute that the MOHLTC is an employer within the meaning of this provision. The question, however, is whether it owes the obligations of an employer under the OHSA to the paramedics. In this respect, I agree with CUPE that it is important to note that manner in which particular obligations are described.

49. Section 46 of the OHSA, referenced by CUPE, relates to the bilateral work stoppage provisions set out in section 45. Section 46(1) permits "a certified member at a workplace or an inspector who has reason to believe that the procedure for stopping work set out in section 45 will not be sufficient to protect a constructor's or *employer's workers* at the workplace from serious risk to their health and safety" to make an application to the Board for a remedy.

50. To this example, other sections can be added which, in some manner, expressly describe rights or obligations under the OHSA by reference to the employer's workers. Section 24(1)(c) imposes obligations upon a licensee to ensure the protection of the health and safety of "*workers employed by employers* referred to in clause (b)". Clause (b) refers to "every employer performing logging in the licensed area for the licensee". That is, consistent with the purpose of the Act, a licensee is responsible to ensure the protection of the health and safety of all workers in its licensed area.

51. Section 27(1)(b) requires a supervisor to ensure that a worker "uses or wears the equipment, protective devices or clothing that the *worker's employer* requires to be used or worn". Similarly section 28(1)(b) requires a worker to "use or wear the equipment, protective devices or clothing that the *worker's employer* requires to be used or worn used". I note that arguably these provisions imply that the corresponding obligation imposed upon an employer by section 25(1)(a) to provide "the equipment, materials and protective devices prescribed" must be read as limited to its workers.

52. By contrast, the employer obligations relied upon by CUPE and Essex in this case are the following:

> 25. (1) An employer shall ensure that,
>
> ....
>
> (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
>
> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
>
> ....
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker;

On their face, none of these obligations are restricted to the employer's workers.

53. The question is, therefore, in what circumstances does an employer have these obligations to a worker? Not surprisingly, the cases establish that an employer has these obligations when it is the, or one of the, employers of the worker. But the cases also suggest that given sufficient proximity, control and risk of harm, an employer owes these obligations to other workers as well.

54. In *R. v. Structform International Ltd.*, [1992] O.J. No. 1711 (OCJGD) at issue was an appeal from a conviction for failure to comply with what is now section 25(1)(c) of the OHSA:

> An employer shall ensure that,
>
> (c) the measures and procedures prescribed are carried out in the workplace;

The conviction related to a scaffold erected by Structform which collapsed, injuring one of its employees. The collapse was the result of actions taken by the employee of another employer. Structform argued that there was no evidence to show that it had failed to ensure that the scaffold was properly constructed. The court rejected this defence, stating:

> The case law is clear that one employer cannot point a finger at another employer who might be closer to the situation. *Every employer has a duty to see that the workplace is safe.* And in the complexity of construction it is important that every employer use knowledge, due diligence, etc., to ensure that the workplace is safe. An employer is not entitled to say it is someone else's responsibility. That is exactly the defence being put forward by this appellant. By the very wording of section [25](1)(c) of OHSA, there is an obligation on an employer to ensure that measures and procedures prescribed as in section 81 of Regulation 691 are carried out in the workplace. The appellant herein has agreed that the requirements of section 81 of Regulation 691 [with respect to the state of the scaffold at the time of the accident] were in fact not carried out. This court finds that there was sufficient evidence before the learned trial judge to convict under this strict liability offence created by OHSA, he being satisfied that the Crown had proved beyond a reasonable doubt that the offence had been committed. It was open to the defendant but it was under no obligation to do so, to offer defence evidence at trial but it chose not to do so and in the result it is apparent that no doubt was raised in the trial judge's mind.
>
> [*Emphasis* supplied.]

While not the subject of express comment, on the facts Structform was found to have this obligation in relation to one of its employees who was in the workplace. Nonetheless, the obligation was interpreted in a broad and purposive manner in order to ensure that the workplace was safe.

55. In *R. v. Wyssen*, (1992) 10 O.R. (3d) 193 (C.A.), the issue was the liability under the OHSA of Jake Wyssen, a window cleaner, for the death of Joseph Coutu. Wyssen had been contracted to clean the windows of four buildings. One of the buildings was beyond his capabilities and he subcontracted that work to Coutu. Coutu had the necessary expertise and provided his own equipment to perform the work. Coutu fell to his death and Wyssen was charged under what are now sections 25(1)(c) and 25(2)(h) of the OHSA. Section 25(1)(c) imposes obligations on "an employer" with respect to "the workplace". Section 25(2)(h) imposes obligations on "an employer" with respect to "a worker". Relying on the complete lack of supervision by Wyssen and independence of Coutu, the courts below had found that Wyssen was not an employer within the meaning of the OHSA and thus entered an acquittal on the charges. It is not clear from the decision whether Wyssen had any other employees.

56. The Court of Appeal reversed. Blair J.A., writing the majority opinion, with which Finlayson J.A. concurred, held that the obligation arose from a literal construction of the definition of

"employer" under the Act: an employer is defined to include a contractor who subcontracted with an independent contractor, and the term "worker" is broader than "employee" and encompassed both employees and independent contractors. The Court also concluded that reading the OHSA as a whole compelled this conclusion. The Court stated that what is now section 25(1) "puts an employer virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors", and that what is now section 25(2)(h) was "even more sweeping". These provisions, the Court held, underlined the fact that: "The legislature clearly intended to make an "employer" responsible for safety in the "workplace"." The Court of Appeal therefore directed a new trial.

57. In *Wyssen*, therefore, the contractor was an "employer" because the independent contractor was its subcontractor and therefore, pursuant to the definition of "employer", one of its workers. The contractor owed the obligations of an employer to a worker of whom it was the employer. Once again, however, the obligations imposed upon "an employer" were interpreted in a broad and purposive manner in order to ensure that the workplace was safe.

58. In *Grant Forest Products Inc.*, [2002] O.J. No. 3374 a manufacturer of forest products contracted with an employment agency to provide temporary staffing. One of the employees provided by the employment agency experienced a work related accident. Grant Forest Products was charged with breaching the obligations of "an employer" under sections 25(1)(a) and (c) of the OHSA in relation to the accident. The contractor argued that the definition of "employer" in the OHSA was overbroad and contrary to sections 2(b) and 7 of the *Charter of Rights and Freedoms*. Justice Bélanger of the Ontario Court of Justice rejected this argument in part because he was bound by *Wyssen*. In doing so he noted that while *Wyssen* held that a contractor had the obligations of an employer towards subcontractors, nothing in *Wyssen* suggested that the defence of due diligence was not available to the contractor with respect to a charge that it had failed to fulfill those obligations. Rather, the result in *Wyssen* was that a new trial was ordered. With respect to the argument that the definition of "employer" was overbroad because, unlike "owners", employers are denied the option of contracting out of the Act, Justice Bélanger concluded by stating:

> Unavailability of an option to contract out of employer responsibilities does not in my opinion make the legislation overbroad. Rather, as stated above, it appears to me to re-enforce a legislative objective to make workplace owners and employers conscious of their responsibilities to take prudent and effective measures to ensure the existence of a safe workplace.

59. An appeal from the decision of Justice Bélanger was dismissed by the Court of Appeal ([2004] O.J. No. 2250) in a four line endorsement which reads as follows:

> Substantially for the reason [sic] of Justice Bélanger we agree that the definition of "employer" in section 1 of the Occupational Health and Safety Act is not overbroad. Moreover, we see no reason to revisit this court's majority decision in *R. v. Wyssen*, (1992), 10 O.R. (3d) 193. The appeal is therefore dismissed.

60. I would note that *Grant Forest Products Inc.* serves to highlight that the degree of control exercised by an employer is relevant to the determination of whether or not such an "employer" has

committed an offence when it has breached its obligations under the Act. The degree of control will also be relevant for the purposes of proceedings before this Board in relation the obligation under section 25(2)(h) of "an employer" to take every precaution reasonable in the circumstances for the protection of "a worker".

61. *Tembec Forest Products (1990) Inc.* [1994] O.O.H.S.A.D. No. 3 (February 3, 1994) was an appeal under section 61 of the OHSA from an inspector's order in relation to an employer's failure to comply with a regulation concerning the proper loading of a truck used to haul logs. It is not clear from the decision under what section of the Act the order was made and in any event the order was rescinded. Prior to doing so, however, the adjudicator rejected an argument that Tembec was not the "employer" on site. Tembec had contracted the work to a subcontractor which in turn had subcontracted the work to an independent contractor who was performing the work in question. Tembec argued that it had no contractual relationship with the sub-subcontractor and that the definition of employer did not capture this relationship. The adjudicator dismissed this argument on the basis that it could not have been the "intention" of the legislature that the obligations of an employer could be avoided by arranging one's legal affairs in such a way to create enough "legal distance" between the parties. In doing so, she cited the passage in *Wyssen* referenced above.

62. In *R. v. Skyway Equipment Co.*, [1997] O.J. No. 6074, (O.C.J.(P.D.)) C. H. Heist contracted with Skyway Equipment Co. to provide scaffolding for a sandblasting and painting operation. Skyway in turn subcontracted part of the work to E & D Scaffold Services. E & D Scaffold Services erected the scaffold. An employee of C. H. Heist fell from the scaffold and sustained fatal injuries as a result of a defect in the scaffold. The defect in the scaffold was the result of an alteration not caused by Skyway. Skyway was charged with failing to meet the obligations of "an employer" under section 25(1)(c) and 25(2)(a) and (h) of the OHSA. The particulars of the charges referred to the deceased C. H. Heist employee. Skyway argued that it was not an employer but rather a supplier and thus the charges must be dismissed.

63. The Justice of the Peace noted that on the date of the accident, Skyway had an employee on site and further that its subcontractor, E & D Scaffold Services, had employees on site. The Justice of the Peace held that as a result Skyway was "an employer on site". Citing passages from *R. v. Wyssen* and *R. v. Structform*, the Justice of the Peace held, without further explanation or comment, that the "extended definition of "employer" in the *Occupational Health and Safety Act* is broad enough to satisfy this court that Skyway has been properly charged as an employer with responsibilities as such on the work site." Implicit was the conclusion that a subcontractor has the obligations of an employer to the employees of its contractor.

64. On appeal, ([1998] O.J. No. 5989, OCJ (PD)) the issue of whether Skyway was an employer was not squarely raised. The Provincial Court did, however, state:

> 22. In relation to the timing, Defence submits that the relevant time for consideration of the employer's duty and whether it was met was prior to any alteration or tampering by Heist employees or persons unknown with the grates and hoppers.
>
> 23. Madam Justice Gotlib in *R. v. Structform International Limited* [1992] O.J. No. 1711 (Ont. Ct. Gen. Div.) September 26, 1991, addresses the issue of the relevant time in that case, indicating that an employer is required to ensure that the workplace complies with the

> prescribed standards "At all times the worker is working".... Since Skyway had the status of "employer" in relation to the workers and the work was ongoing at the time of the accident, Skyway's duties and responsibilities to ensure workplace safety continued to be operative.

It is not clear whether the court was stating that Skyway had the obligations of "an employer" to the deceased C. H. Heist employee because the court considered that it was "the employer" of the C. H. Heist employee or because the court considered that as an "an employer" on site it had the obligations of "an employer" to workers of other employers on site. It is to be noted that the former approach would require giving the definition of "employer" an expansive reading so that not only is a contractor the employer of the workers of its subcontractor, but the subcontractor is the employer of the workers of its contractor.

65. In *R. v. London Excavators & Trucking Ltd.*, [1998] O.J. No. 6437 (C.A.) a general contractor, Cooper Corporation Limited, subcontracted with London Excavators & Trucking Limited to excavate a construction site. Cooper advised London that the site was clear of any services. A backhoe operator employed by London struck concrete. A supervisor employed by Cooper advised him that it was safe to proceed and directed him to do so. The concrete encased a hydro duct and when the backhoe cut through it there was an explosion. London was charged and convicted of failing to meet the obligations of "an employer" under section 25(1)(c) of the OHSA in relation to, it appears, the backhoe operator who was its own employee.

66. On appeal to the Court of Appeal, London argued that while both it and Cooper were "employers" within the meaning of the OHSA, Cooper had ultimate supervisory responsibility for the excavation, and thus it was objectively reasonable for London to have relied upon Cooper's directions. The Court of Appeal dismissed the appeal, stating:

> It was not objectively reasonable for the appellant to continue to rely, without further inquiry, upon the direction of the general contractor once an unexpected concrete obstacle had been encountered in a location the general contractor had pronounced safe to excavate. At that point, it was incumbent upon the appellant, in the interest of safety of its employees *and others who might be exposed to risk of harm*, to ensure that the prescribed measures and procedures designed to protect their safety had been carried out in the workplace.
>
> [*Emphasis* supplied.]

67. I think it is important to note that, strictly speaking, the emphasized comment by the Court of Appeal was *obiter dicta* since the issue was not whether London Excavators owed the obligations of an employer to the employees of another employer, rather it was whether it was objectively reasonable for it to rely on the representations of another employer in fulfilling its obligations to one of its employees. Thus, it was not necessary for the Court of Appeal to determine whether or not London Excavators owed the obligations of an employer to the workers of another employer. However, the *obiter* comment in *London Excavators* can be understood in one of two ways. First, it can be understood as suggesting that the definition of employer includes a subcontractor in relation to the employees of its contractor, since on the facts of that case the only other employees referred to were the employees of the contractor. Second, it can be understood as suggesting that as an "an employer" on site it had the obligations of "an employer" to workers on site of which it was not "the employer" but who might be exposed to risk of harm by its actions or inactions.

68. The meaning to be ascribed to the emphasized words in *London Excavators* was the subject of comment in *R. v. Iroquois Falls Hydro-Electric Commission*, unreported, December 19, 2001, O.C.J. In that case, the Town of Iroquois Falls contracted separately with Iroquois Falls Hydro-Electric Commission ("IFHEC") and another company, Claybelt, to install a three phase transformer on a pole (IFHEC's responsibility) in order to run electricity from the transformer into a local arena (Claybelt's responsibility). Notably, there was no contractual relationship between IFHEC and Claybelt and in particular they did not stand in the relationship of contractor and subcontractor to each other. IFHEC ordered an appropriate transformer. No one noticed that a different transformer, of significantly higher voltage, was in fact received. IFHEC connected the transformer. An employee of IFHEC advised employees of Claybelt that the transformer was "live" and asked if anyone had a voltage meter or tester. An employee of Claybelt had a tester which he used to perform a test. Because the wrong transformer had been installed, the employee of Claybelt sustained an injury.

69. IFHEC was charged with failing to meet the obligations of "an employer" under section 25(2)(a) and (h) of the OHSA in relation to the Claybelt employee. A Justice of the Peace acquitted on the basis that IFHEC owed no duty to the worker at the time of the accident. On appeal from the acquittal, the Provincial Court upheld the appeal and remitted the matter for fresh trial. The court stated (at p. 9):

> The responsibility of the employer does not extend only to its employees but to all workers on a project whose safety may be compromised if they do not receive the appropriate information or precautions, reasonable in the circumstances for their protection.
>
> In the case at bar, the respective spheres of operation of the defendant and Claybelt were contiguous, that is to say, the work of Claybelt picked up where the work of the defendant left off, and it was therefore incumbent upon the defendant to alert Claybelt and its employees to the voltage being provided.
>
> [Catzman J.A.] for the Ontario Court of Appeal in [*R. v.*] *London Excavators and Trucking Limited* put it this way.
>
>> At that point, it was incumbent upon the appellant in the interests of the safety of its employees and others who might be exposed to risk of harm (emphasis mine) to ensure that the prescribed measures and procedures designed to protect their safety had been carried out in the workplace.

70. Like *London Excavators*, the finding in *Iroquois Falls*, can be understood in one of two ways. First, it can be understood as suggesting that the definition of employer includes a subcontractor in relation to the employees of another subcontractor of a shared contractor: that is, the subcontractor is "the employer" of such workers. Second, it can be understood as suggesting that as an "an employer" on site, the subcontractor had the obligations of "an employer" to workers on site of which it was not "the employer" but who might be exposed to risk of harm by its actions or inactions. In either event, the obligation arises because of the potential for harm the subcontractor's actions, or inactions, posed to the employees of the other subcontractor.

71. In *Pioneer Construction*, (2006), 79 O.R. (3d) 641, the defendant had contracted with P.D. Brooks, a common carrier, to deliver sand and salt to its work site. A truck driver employed by P.D. Brooks delivered a load of sand and salt to the site. The sand and salt was offloaded onto a conveyor belt system called a Uniloader. Responsibility for the flow of sand and salt onto the Uniloader and the Uniloader's operation was that of an operator employed by Pioneer Construction, not the truck driver. The Uniloader operator absented himself to make a phone call. The driver noticed that the flow of sand and salt from the truck box to the Uniloader had ceased and used a sledge hammer to hit the box of the truck. He did not shut off the Uniloader before doing so because he did not think it was his place to do so. A large portion of sand fell onto the conveyor belt in such a way that the driver's foot was caught and he fell onto the conveyor belt and was injured. Pioneer Construction was convicted of failing to meet the obligations of "an employer" under sections 25(1)(a) and 25(2)(a). It appealed on several grounds, including the argument that it was not the employer of the driver.

72. The portion of the Court of Appeal's reasons addressing this issue in *Pioneer Construction* are sufficiently short that it is worth setting them out in their entirety:

> Did the appeal justice err in upholding the trial judge's decision that Pioneer was the "employer" of a non-employee driver, who was directly employed by P.D. Brooks, a common carrier that was delivering sand to the M.T.O. yard?
>
> [19] The reasons in *R. v. Wyssen* (1992), 10 O.R. (3d) 193, [1992] O.J. No. 1917 (C.A.) are dispositive of this issue and we see no reason to revisit them. There was no dispute that Pioneer had contracted for Mr. Carr's services through his immediate employer, P.D. Brooks. Just as a contractor who hires the services of a tradesperson through another employer (a subcontractor) assumes responsibilities as an employer for that tradesperson while that person is working in a workplace under the control of the contractor, so Pioneer became the employer of Mr. Carr when he was working in a workplace controlled by Pioneer providing services to Pioneer. The narrow definition of "employer" advanced by Pioneer is inconsistent with a purposive interpretation of the statute. This ground of appeal also fails.

73. In *Pioneer Construction*, then, the Court of Appeal held a person which contracts for the services of a common carrier has the responsibilities of an employer to an employee of that common carrier "while that person is working in a workplace under the control of the contractor". It appears that the Court reached the conclusion based on an expansive reading of the definition of employer. One way to understand this decision is to consider that Pioneer and P.D. Brooks were in the relationship of contractor and subcontractor in relation to the provision of common carrier services, and that as a contractor Pioneer owed the duties of an employer to the employees of its subcontractor. Even on this interpretation *Pioneer Construction* is arguably an extension on the application of the principles recognized in *Wyssen* since in that case the duties were found only in relation to a subcontractor of the contractor, not an employee of the subcontractor. It is also worth considering whether the result should have been any different had the contract between Pioneer Construction and P.D. Brooks been for the provision of sand and salt, rather than the provision of common carrier services.

74. In *K. Winter Sanitation Inc.*, [1999] OLRB Rep. March/April 219 (April 28, 1999), the issue was the standing of K. Winter Sanitation Inc., a supplier of toilet and clean up facilities to a

construction site, to appeal an order under section 61 of the OHSA made against Richard & B.A. Ryan Ltd., the constructor responsible under the OHSA to ensure that appropriate toilet and clean up facilities were available on the site. The responding parties took the position that as the order was made against Ryan and not K. Winter, K. Winter lacked standing to bring the appeal. The Board noted that K. Winter was a person which employed workers and thus was an employer within the meaning of the OHSA (at paragraph 16). At the same time, K. Winter was "not an employer on the Ryan construction project against whom the order was issued" (paragraph 22). The Board noted, however, that section 61 permits, *inter alia*, "any employer ... which considers itself aggrieved by an order made by an inspector under this Act" to appeal an order to the Board, and on that basis concluded that K. Winter had standing to bring the appeal. As the case was concerned with the scope of the term "considers itself aggrieved" as it applied to "any employer", I do not find it of assistance on the issue before me.

75. The final decision to touch upon the issue of employer obligations provided by the parties is *Abarquez v. Ontario*, [2005] O.J. No. 3504 (SCJ). *Abarquez* concerned a claim in negligence brought by a number of nurses against the Crown in relation to the SARS crisis. The statement of claim alleged, among other things, a duty of care on the part of the Crown towards the nurses on the basis that Directives issued by the MOHLTC rendered the Crown an employer or supervisor of the nurses within the meaning of the OHSA. The Superior Court struck the claim based on the assertion that the MOHLTC was an employer of the nurses, but did not strike the claim that the MOHLTC was a supervisor (the claim that the MOHLTC was a supervisor was subsequently struck by the Court of Appeal, as discussed further below). The Superior Court's reasons for striking the claim that the Crown was an employer of the nurses were as follows (at paragraph 16):

> Although the definition of "employer" has been extended since its first enactment, and the trend of the authorities is to construe the definition broadly, I see no basis for a finding that the Crown was an employer of the nurses. Public hospitals are corporations and are the employers of the nurses. The inclusion of contractors, and subcontractors in the definition indicates that a worker may have more than one employer for the purposes of the statute, but each such employer must fall within the definition. It has not been suggested that hospitals perform functions assigned or delegated to them by the Crown.

76. The issue put to the Superior Court was whether based on the nurses' pleadings the Crown was an employer of the nurses. The Court quite clearly determined that the Crown did not, for this purpose, fall within the definition of employer. It is not clear, however, what the significance of the last sentence in the paragraph is to this determination. It is also not clear whether the Court was called upon to determine whether even if the Crown was not an employer of the nurses it nonetheless had the obligations of an employer to the nurses in the circumstances of the case. It may be that in stating that it "had not been suggested that hospitals perform functions assigned or delegated to them by the Crown", the Court was stating that if such a suggestion had been pled then it would have been arguable that the Crown had the obligations of an employer to the nurses and that the pleadings would not have been struck.

77. What emerges from this review of the case law is that an employer has the obligations of "an employer" to "a worker" not only to its own employees but to employees of other employers whose respective spheres of operation are contiguous when the safety of those workers might be exposed to risk of harm by a failure on the employer's part to ensure that the prescribed measures and

procedures designed to protect their safety had been carried out in the workplace. What is less clear is the basis for these obligations. Does it arise because an employer is an employer of the workers in question? Or does it arise because the obligations in question are not restricted to an employer's workers but may in some circumstances apply to other workers?

78. Clearly, as highlighted by *Wyssen*, the definition of employer contained in the OHSA makes a person an employer of workers in an expanded set of circumstances. As the employer of a worker, a person has all of the obligations of an employer in relation to that worker, regardless of the degree of control or supervision which the person has over the worker in a particular circumstance. Thus, in *Wyssen*, a contractor was the employer of a subcontractor, and had the obligations of an employer to that subcontractor, notwithstanding the complete lack of supervision or control exercised.

79. Some of the cases, however, are difficult to understand on the basis that the person was an employer of the workers, notwithstanding the expanded definition of employer contained in the OHSA. While it is relatively easy to find that the definition makes a contractor the employer of the employees of its subcontractors (*Grant Forest Products* and, arguably, *Pioneer Construction*), it becomes progressively more difficult to reach this conclusion with respect to: a contractor in relation to a subcontractor of its subcontractor (*Tembec Forest Products*); a subcontractor in relation to employees of its contractor (*Skyway Equipment*); or a subcontractor in relation to the employees of another subcontractor with which it has no contractual relationship (*Iroquois Falls*).

80. Further, the findings that the obligations of an employer existed in some of these cases appear to be predicated on the fact that the employer in question had some element of control over the workers to whom the obligations were owed. Thus, in *Pioneer Construction*, the contractor had the obligations of an employer to an employee of one of its subcontractors "while that person is working under the control of the contractor". In *Iroquois Falls*, a subcontractor had the obligations of an employer to employees of another subcontractor because their operations were "contiguous" and they were "workers on a project whose safety may be compromised if they do not receive the appropriate information or precautions, reasonable in the circumstances for their protection". These cases are inconsistent with *Wyssen* which, it will be recalled, held that an employer was "virtually in the position of an insurer" regardless of the degree of control over the workers or the workplace, unless the reason for finding an obligation in *Pioneer Construction* and *Iroquois Falls* is not that the employer in question was an employer of the workers.

81. These cases, therefore, are better understood as holding, that unless the context requires otherwise, obligations imposed upon "an employer" to "a worker" under section 25 of the OHSA are not restricted to the employer's workers, but extend to other workers working under its control and, where its sphere of operations are contiguous with that of a second employer, to the workers of the second employer whose safety may be compromised if they do not receive appropriate information or precautions from it. It is the "risk of harm" and the need to ensure the safety of workers, to paraphrase *London Excavators*, which gives rise to the obligation. Given this, I reject the MOHLTC's assertion that this obligation is necessarily limited to "physically" contiguous spheres of operation.

82. Such an approach has the virtue of being self limiting. While a worker's employer will always have the obligations of an employer to the worker, other employers will only have those obligations to the extent that they have control of the worker or are engaged in contiguous spheres of operation which pose a risk of harm to the worker in relation to the obligation in question. Such an

approach also answers the real question posed when it is alleged that a person has breached an obligation by "an employer" to "a worker". That question is not does the person fall within the definition of "employer". That will rarely be at issue. The real question is whether as an employer it owes the obligation to the worker or workers in question.

83. The applicability of this approach is well illustrated by the realities of construction projects, although in saying so I do not suggest that it is limited only to construction projects. There is no reason why two subcontractors performing completely separate tasks, even contemporaneously, should owe the obligations of an employer to each other's employees. Indeed, finding that they did owe the obligations of an employer to each other's employees in such a circumstance would result in duplication of effort and the potential for competing directives to those workers. However, if one subcontractor exercises control over the employees of another subcontractor or engages in contiguous activities which pose a risk of harm, including latent harm, then it is subject to the obligations of an employer in relation to those workers with respect to that exercise of control or that risk of harm.

84. The question, therefore, is whether the MOHLTC owes obligations of an employer to the paramedics either because it is an employer of the paramedics or because it exercises control over the paramedics or engages in contiguous activities which pose a risk of harm to the paramedics in relation to the obligations at issue.

Is the MOHLTC an "employer" of the paramedics?

85. CUPE and Essex argue that the MOHLTC is an employer of the paramedics because the MOHLTC has entered into a contract for their services with Essex or because the paramedics are its employees.

Has the MOHLTC entered into a contract for the services of the paramedics with Essex?

86. Presumably having regard to the portions of the definition of employer that include a person who "contracts for the services of one or more workers" and subcontractors and contractors, both CUPE and Essex argue that the nature of the relationship between Essex and the MOHLTC is contractual.

87. CUPE points to the County of Essex Emergency Medical Services Deployment Plans, signed by Bildfell, as Director, Land Ambulance Services, on behalf of Essex, and with places for the signatures of Krauter, as Manager, Windsor CACC, and Duffin, as Field Manager, Southwest Field Office, Emergency Health Services Branch, MOHLTC, and to the Local Operational Agreement between the Windsor CACC, which has places for the signatures of the Senior Field Manager, Southwest Field Office, Emergency Health Services Branch, the Manager, Windsor CACC, and the Land Ambulance Director for the County of Essex.

88. Essex also relies on the Deployment Plans and the Local Operational Agreement. Essex notes that s. 16 of O. Reg. 257/00 to the *Ambulance Act* mandates an agreement between itself and MOHLTC and argues that this renders the MOHLTC an employer within the meaning of the OHSA, presumably on the basis that the agreement renders Essex a subcontractor of MOHLTC. It argues that it is trite law that an agreement between a party and the Crown is a contract, citing *Bell v. Quagliotti*, [1918] B.C.J. No. 114.

89. Part VII of O. Reg. 257/00 provides in part as follows:

> **15.** In this Part,
>
> "applicable enterprise" means a communications service or any base hospital program or land ambulance service that receives funds directly from the Province of Ontario on an ongoing basis but does not include a communications service or land ambulance service that is operated by the Ministry.
>
> **16.** On and after January 1, 2001, the operator of an applicable enterprise shall be a party to an agreement with the Ministry for the provision of ambulance or communications services or the operation of a base hospital program, as the case may be.

90. I agree with the MOHLTC that an agreement under section 16 of O. Reg. 257/00 does not relate to the provision of ambulance services by a UTM: the UTM is already statutorily required to provide those services by section 6(1) of the *Ambulance Act*. Rather, an agreement pursuant to section 16 relates to the exercise by the Minister of his/her discretion under section 4(3) of the *Ambulance Act* to provide funding for those services. This is quite clear from the definition of "applicable enterprise", set out above, and an examination of Part VII as a whole. Part VII is concerned with financial accountability by an "applicable enterprise" for funds, equipment or supplies provided by the Province of Ontario, not with the provision of the ambulance services per se.

91. Accordingly, the evidence does not establish that the relationship between the MOHLTC and Essex is contractual.

Are the paramedics employees of the MOHLTC as well as Essex?

92. There is no dispute on the evidence that Essex has the power to hire, fire, discipline, and promote the paramedics, schedule work, grant leaves of absence, determine how much they are paid and deal with employee complaints, all in accordance with a collective agreement between itself and CUPE to which the MOHLTC is not a party. Other than as described in what follows, the MOHLTC does not have the power to do any of these things. Essex is the employer of the paramedics. CUPE and Essex argue, however, that the MOHLTC is also an employer of the paramedics, in common with Essex.

93. A difficulty with this argument is that there is no common employer provision in the OHSA. I note, however, that the doctrine of "common employer" is now well established at common law: see for example *Downtown Eatery (1993) Ltd. v. Ontario*, (2001) 54 O.R. (3d) 161 (C.A.). Thus, it is arguable that where an individual was under the common direction and control of more than one entity, that individual could be the employee of both with the result that both could be found to be the "employer" of the individual within the meaning of the OHSA, notwithstanding the absence of an equivalent to section 1(4) of the *Labour Relations Act, 1995*.

94. In considering this argument, however, I have been mindful of the decision of the Court of Appeal in *Ontario Legal Aid Plan v. Ontario Public Service Employees Union*, (1991) 6 O.R. (3d) 481. In that case, the Court noted that not every relationship of dominance constitutes the dominant party a common employer of the subordinate party's employees. More, particularly, dominance

which is but a consequence of a relationship contemplated by a regulatory and funding scheme does not constitute the dominant entity a common employer, at least not for the purposes of what is now section 1(4) of the *Labour Relations Act, 1995*.

95. Essex notes that *OLAP* concerned the interpretation of the *Labour Relations Act*, and argues that is not consistent with the manner in which the OHSA should be interpreted. It argues that the Crown was not subject to the provisions of the predecessor of the *Labour Relations Act, 1995* at the time that *OLAP* was decided. By contrast, section 2(1) of the OHSA specifically states that it binds the Crown or any agency, board, commission or corporation that exercises any function assigned or delegated to it by the Crown. Further, it argues that this case arises not from any regulatory function of the MOHLTC, but rather from its operation of the communications services.

96. CUPE notes that section 2(2) of the OHSA provides: "Despite anything in any general or special Act, the provisions of this Act and the regulations prevail." It argues that in the result it is "no defence" that the MOHLTC does everything pursuant to the *Ambulance Act*. Further, it argues that the MOHLTC is not simply a funder or a regulator of the emergency medical services provided by Essex through the work of its paramedics. Rather, the MOHLTC has a day-to-day, even minute-to-minute presence in the workplace of those paramedics through the dispatchers, who are employees of the MOHLTC. It argues that it seeks orders against the MOHLTC not as a funder or regulator but as provider of the communications services and with authority over the paramedics through its dispatchers.

97. These arguments may be addressed as follows.

98. First, in my view it is helpful to distinguish between different types of functions imposed by regulation or statute. For the purposes of this case, MOHLTC performs three different types of such functions: regulatory, funding and operational.

99. Second, there is no dispute that the OHSA binds the MOHLTC, or more properly the Crown of which the MOHLTC is a ministry. (I note in response to one of Essex's arguments that equally the *Labour Relations Act* bound OLAP: the fact that the *Labour Relations Act* did not, at the time, bind the Crown is irrelevant.) This, however, does not transform a regulatory or funding function mandated by regulation into a managerial function such as would give rise to an employment relationship. That is the ratio of the *OLAP* decision. Nor is there any consequential inconsistency between the *Ambulance Act* and the OHSA in which the OHSA must be given precedence.

100. Third, it is correct that MOHLTC has not only regulatory and funding functions mandated by regulation in relation to the emergency medical services, but also an operational role with respect to the provision of those services. The difficulty is that many of the indicia of control pointed to by CUPE and Essex as giving rise to an employment relationship clearly arise not from the operational role, but from the regulatory and funding role. In particular, the Ambulance Service, Patient Care and Transportation Standards and the Land Ambulance Service Certification Standards, referenced in Part II of O. Reg. 257/00 with which Essex and its paramedics are required to comply are a product of this regulatory relationship. Similarly the certification of the paramedics themselves and the issuance by the MOHLTC of a Paramedic Identification Card, which paramedics require in order to work, is another product of this regulatory relationship. To the extent that the Minister is exercising regulatory and funding functions, I agree with the MOHLTC and the Inspector that the relationship of

dominance between the MOHLTC and Essex, and the paramedics employed by Essex, does not give rise to an employment relationship.

101. CUPE and Essex also argue, however, that the operational functions performed by the MOHLTC, in providing communications equipment and dispatch functions, render it an employer within the meaning of the OHSA. These functions are described in greater detail below in relation to the question of whether the MOHLTC owes the obligations of an employer to the paramedics notwithstanding the fact that it is not their employer. In my view, however, these functions alone are not sufficient to render the paramedics employees of the MOHLTC so as to render it their employer, in common with Essex, within the meaning of the OHSA.

Does the MOHLTC have obligations of an employer under of the OHSA to the paramedics even though it is not an employer of the paramedics?

102. The Inspector argues that while the MOHLTC is not an employer of the paramedics it has the obligations of an employer to the paramedics. CUPE and Essex also advance this argument as an alternative position.

103. For the reasons stated above, notwithstanding my finding that it is not an employer of the paramedics, in my view, the MOHLTC has some of the obligations of an employer to the paramedics if and to the extent that it exercises control over the paramedics or is engaged in contiguous sphere of operations with Essex such that its activities pose a risk of harm, including latent harm, to the paramedics in relation to that obligation.

104. The Inspector, CUPE and Essex rely on the obligation of paramedics, and Essex, to comply with directions given by Windsor CACC in its performance of these operational functions.

105. I note that there is a degree to which this obligation to comply with operational directions can be seen as a product of regulatory and funding functions. As noted, section 6(1) of the *Ambulance Act* makes UTMs responsible for the provision of ambulance services. However, in order to provide these services itself, a UTM must obtain a certificate from the MOHLTC as an operator of ambulance services: section 8(1). In order to be certified, a person must complete the certification process: section 8(2). Certificates must be renewed periodically: section 8(3). In order to complete the certification process, a person must demonstrate that they meet the certification criteria prescribed in regulations to the Act: section 8(5). An operator is required to be in compliance with the requirements of the *Ambulance Act*, regulations thereto and the certification criteria at all times: section 11(1). The Director may order an operator to complete the certification process within a specified time frame: section 11(1)(b). Failure to do so results in revocation of the operator's certificate: section 11(3). The Director's order is subject to appeal to the Heath Services Appeal and Review Board: section 14. Decisions of that Board may be appealed to the Divisional Court: section 16.

106. The regulations specify that the certification criteria are set out in the "Land Ambulance Certification Standards" published by the MOHLTC, as that document is amended from time to time: O. Reg. 257/00 s. 3(1). The Land Ambulance Certification Standards in turn provide in part:

> (h) No employee of the applicant/operator's land ambulance service shall refuse or disregard the direction of a communications officer in regard to any request for ambulance service.

Thus refusal of Essex or one of its paramedics to comply with a direction from a communications officer (i.e. a dispatcher) could in theory result in Essex losing its certification as a land ambulance service.

107. I make two comments in relation to the significance of the fact that the operational directions can be seen as a product of regulatory and funding functions. First, to the extent that this is true in my view the obligations under the OHSA still prevail. We are not concerned here with whether regulatory or funding functions constitute the MOHLTC a common employer: they do not for the reasons stated above. We are concerned with whether regulatory or funding functions under another Act can be used to compel workers to perform unsafe work. To state the question is to answer it. That is why section 2(2) of the OHSA provides that despite anything in any general or special Act, the provisions of the OHSA and the regulations to it prevail.

108. Second, and in any event, the control the MOHLTC exercises over the paramedics in relation to communications and dispatch is at best only incidentally a product of this regulatory and funding function. Rather, it arises from the practical necessity of integrating the communications and dispatch functions retained by the MOHLTC with the provision of service functions which were transferred to Essex in 1998. This necessity would exist whether or not the certification criteria required Essex and its paramedics to comply with directions from dispatchers employed by the MOHLTC. While the MOHLTC is required by statute to operate the communications and dispatch functions, in performing those statutory functions per se the MOHLTC is performing no regulatory function in relation to Essex.

109. The integration of the communications and dispatch functions performed by the MOHLTC with the provision of service functions performed by Essex is reflected in large part by the County of Essex Emergency Medical Services Deployment Plan. This document addresses, among other things: minimum staffing levels in different parts of the County to be maintained by the "ACO", i.e. Ambulance Communications Officers, which includes call takers and dispatchers, employed by the MOHLTC at the CACC; procedures for "up-staffing", which require approval from the on duty CACC Supervisor/Manager; the period of time during which the dispatchers, in their discretion, are to schedule lunch periods for paramedics; the procedures to be followed by call takers and dispatchers with respect to violent or potentially violent patients, including what information is to be conveyed to the paramedics (this issue is discussed in greater detail below under "flagging"); the circumstances in which an Advanced Life Saving (ALS) unit is to be dispatched by the CACC to back up a Basic Life Saving (BLS) unit; maximum permissible delays for the CACC in dispatching an ambulance in certain circumstances; which of Essex's ambulance vehicles are to be considered "specialty ambulance service vehicles" by the CACC; which EMS staff may be dispatched by the CACC to "Boblo Island", which apparently is accessible only by private ferry; during which hours dispatchers may assign EMS in different areas to perform "transfers" or other low priority calls, as opposed to responding to emergency calls; limitations on the ability of dispatchers to assign certain types of calls to paramedics if it will result in a "shift overrun"; circumstances in which the CACC is to notify the police, the fire department or Windsor Airport Security in connection with the provision of emergency medical services by Essex; the basis on which emergency coverage will be re-established in the event that it has been compromised or depleted; the circumstances in which an ambulance crew will be considered to have only "Conditional Availability" (as distinct from being required to be

immediately available); approved call back time response times for an ambulance crew, failing which the CACC is to dispatch the next closest on-site vehicle; the manner in which ambulance crews will be paged while at base (i.e. one of several ambulance stations); disaster response protocols; and radio procedures when 3 or more units have been dispatched to a single scene.

110. This level of integration carries with it a concomitant level of control by the MOHLTC. The paramedics are under the constant direction and control of its CACC from the beginning to the end of their shifts. Thibodeau testified that the first thing that a paramedic does at the beginning of the shift is to contact a dispatcher at the CACC to be logged onto the communications system. If the paramedic is not logged on he or she literally cannot work. Further, the provision of emergency medical services by Essex simply would not work if paramedics did not follow the CACC's directions. To suggest that this arises only as a product of the regulatory and funding functions of the MOHLTC proper is to deny the operational reality. While the CACC has no power to discipline or discharge a paramedic, it does report paramedics who fail to comply with its directions to Essex. Krauter, the Manager of the Windsor CACC, conceded that she would expect a paramedic who did not comply with direction to be subject to discipline by Essex.

111. A great deal of hearing time was spent on the proper characterization of the Deployment Plan. The MOHLTC argues that the Plan constitutes instructions from Essex to the Windsor CACC as to how to dispatch Essex's ambulances and crews. It relies on the fact that on its face the document originates from Essex and is signed by the Director of Land Ambulance Services for Essex. It also relies on the fact that the document states: "Deployment and scheduling of ALS resources is based on service scheduling patterns that are determined by the service operators in accordance with the provisions of their respective collective agreements." The MOHLTC notes that Essex, and not the MOHLTC, is a party to those collective agreements.

112. In my view the Deployment Plan is more accurately characterized as a joint document of Essex and the Windsor CACC. I note, in this respect, the following evidence. First, the original County of Essex Deployment Plan was in fact the deployment plan used by the MOHLTC prior to the downloading of services. Second, there are a number of instances in the portions of the Deployment Plan which were placed into evidence in which the "CACC Manual of Practice", a MOHLTC document, is cited as a reference. Third, the Deployment Plan is subject to approval by the Manager of the CACC and authorization by the Southwest Region Field Office of the MOHLTC. Fourth, the evidence suggested that the Deployment Plan was a product of negotiation between the County of Essex, Director, Land Ambulance Services and the Manager of the Windsor CACC. Fifth, the Manager of the Windsor CACC testified that in any event the Windsor CACC would not follow the Deployment Plan if it was contrary to directives which she received from the MOHLTC. In particular, she testified that she would not "flag" an address, even if the Deployment Plan directed the Windsor CACC to do so, because she had been directed by the Southwest Field Office of the MOHLTC that flagging is not acceptable. This is borne out by the fact that the section of the Deployment Plan dealing with Violent or Potentially Violent Patients (Section 4.5) replicates the Local Operational Procedure adopted by the Windsor CACC on February 16, 2006, as discussed further below under the discussion of flagging.

113. Other than in the most formalistic of senses, the Deployment Plan does not, therefore, constitute a set of directions from Essex to the Windsor CACC. Rather it is a product of negotiations necessitated by the degree of integration of the functions performed by Essex and the Windsor CACC in which the MOHLTC has at least an equal if not dominant role.

114. As noted earlier in this decision, in addition to performing the dispatch functions through its CACC, the MOHLTC also: determined which communications system will be used by the paramedics and the functionality of that system; determines what communications equipment will be provided to the paramedics in relation to the performance of their duties, and notably has determined to provide only one portable radio per ambulance crew, as well as, for now at least, one cell phone; and determines the manner in which that communications equipment can be used, notably when and whether the emergency buttons on the portables may be used, restricted use of the "mike to mike" functions on the cell phones and precluded use of the communications system to "flag" potentially hazardous addresses.

115. The question then remains whether the MOHLTC's absolute control over the provision of communications equipment and the necessary integration of the dispatch functions performed by its CACC, in conjunction with the EMS functions performed by Essex, is sufficient to impose upon it the obligations of an employer in relation to the paramedics. In my opinion it is. The dispatch functions of the MOHLTC are not simply contiguous with the EMS functions of Essex they are highly integrated with those functions. Further, as will shortly be seen, a failure by the MOHLTC to ensure that certain measures and procedures designed for the safety of the paramedics have been carried out exposes them to a risk of harm. First, however, I wish to address another issue.

In the alternative, whether the MOHLTC is a "supervisor" of the Paramedics

Introductory Note

116. In the event that I am wrong that the control exercised by the MOHLTC and the contiguity of its sphere of operations in relation to the paramedics with those of Essex impose upon it the obligations of an employer in relation to the paramedics, then, for the reasons that follow, I conclude that they constitute it a supervisor of the paramedics within the meaning of the OHSA.

Summary of the Parties' Arguments

117. CUPE argues that the MOHLTC is a supervisor. It cites *R. v. Walters*, [2004] O.J. No. 5032 (S.C.J.) and *R. v. Adomako*, [2002] O.J. No. 3050 (O.C.J.). Essex adopts its arguments on this issue.

118. The Inspector acknowledges that the definition of "supervisor" refers to a person, and that in law a "person" has included corporate entities. But he asserts that there is no case in Ontario which has found a non-natural person to be a supervisor under the OHSA and argues that a non-natural person could not carry out the functions of a supervisor under the OHSA.

119. Like the Inspector, the MOHLTC argues that as a non-natural person it cannot be a supervisor under the OHSA because a non-natural person cannot carry out the functions of a supervisor under the OHSA. It makes reference to sections 26(1)(l), 28(1)(c) and (d) and 45(1), as well as section 25(2)(c). It also argues that the OHSA contemplates a hierarchy of relationships in which employers may be corporate but are charged with employing competent supervisors. This obligation, it submits, is to retain an individual who is competent to direct the workforce.

Is the MOHLTC a "supervisor" of the paramedics?

120. Supervisor is defined by the OHSA as follows:

> "Supervisor" means a person who has charge of a workplace or authority over a worker;

121. There is a relational aspect to this definition: thus, a person is only a supervisor to the extent that the person has charge of a workplace or authority over a worker.

122. The arguments of the Inspector and the MOHLTC that a non-natural person cannot be a supervisor require consideration of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F. Section 87 of the *Legislation Act, 2006* provides: "In every Act and regulation ... "person" includes a corporation". Thus, the *Legislation Act, 2006* provides a basis for concluding that a corporation may be a supervisor.

123. The Inspector, however, relies upon sections 46 and 47 of the *Legislation Act, 2006*. Those sections provide:

> 46. Every provision of this Part applies to every Act and regulation.
>
> 47. Section 46 applies unless,
> (a) a contrary intention appears; or
> (b) its application would give to a term or provision a meaning that is inconsistent with the context.

The Inspector also refers to *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 41 for what he asserts are the interpretative principles applicable to the meaning of the term "supervisor":

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Inspector argues that the ordinary meaning of supervisor is a person, and more specifically an individual who supervises, and that therefore supervisor as used in the OHSA means an individual. Further, the Inspector notes that section 25(3) of the OHSA uses the words "himself or herself" in reference to a supervisor, as do numerous regulations under the OHSA. The Inspector argues that these gender specific terms can only apply to individuals. Finally, the Inspector references various duties imposed upon supervisors by the regulations which a supervisor is incapable of doing personally or at all unless done through an individual.

124. These arguments are not persuasive. First, *Rizzo & Rizzo Shoes* is not an invitation to ignore definitions set out in the subject Act or the *Legislation Act, 2006* and substitute some preferred "ordinary" meaning. Indeed, to do so would clearly be to ignore the intention of the Legislature, contrary to the cited principle. Second, it does little to advance the issue to argue that a supervisor must be a person or be able to act personally given that a supervisor is defined under the OHSA as a person and the *Legislation Act, 2006* in turn defines person as including a corporation. A corporation is, therefore, able to act personally. Third, it is not correct to say that the use of gender specific terms

in the OHSA, and regulations thereto, compel the conclusion that a supervisor must be an individual. Section 68 of the *Legislation Act, 2006* provides: "Gender-specific terms include both sexes and include corporations." Fourth, by contrast to the definition of "person" contained in section 86 of the *Legislation Act, 2006* as including corporations, section 87 of the *Legislation Act, 2006* provides that the term "individual" means a natural person. If the Legislature had intended supervisors to be restricted to natural persons, the definition of supervisor would have referred to individuals, not persons.

125. Nor am I persuaded by the argument of the Inspector and the MOHLTC that because only a natural person can fulfill some of the roles or duties of a supervisor under the OHSA, it follows that only a natural person can be a supervisor. The same argument could be made with respect to an employer, which is also defined as a "person", and many of the roles or duties imposed upon "employers" under the OHSA. Indeed, section 28(1)(c) and (d), relied upon by the MOHLTC in its argument, impose duties upon a worker to report certain matters to an "employer or supervisor". The apparent conundrum is resolved by the fact that corporate persons ultimately act through natural persons. The fact that a corporation would need to appoint individuals to discharge some of its responsibilities as a supervisor, and that the individuals appointed might also be considered supervisors of the workers in question, is not a reason to conclude that a corporation cannot be a supervisor.

126. The Inspector argues that certain provisions in regulations to the OHSA point to the conclusion that a supervisor must be an individual. Reference was made to section 14 of O. Reg. 213/91, section 33(4) of O. Reg. 67/93, sections 10, 16(1) and 64(2) of O. Reg. 854 and sections 6(b), 12(7) and 13(9) of O. Reg. 629/94. I acknowledge that some of these regulatory provisions appear to contemplate the appointment of an individual as a supervisor. Further, these regulatory provisions form part of the context within which the meaning of provisions of the OHSA must be interpreted. Regulations, however, are subordinate to statutory language. In any event, the fact that some regulations contemplate the appointment of individuals as supervisors does not mean that all supervisors must be individuals.

127. Finally, I note that not only is an interpretation of the OHSA which holds that a supervisor may include a non-natural person consistent with the legal meaning given to the word "person", it is consistent with a broad and purposeful interpretation of the OHSA, in particular if the exercise of authority over a worker or control of the workplace is not sufficient to impose upon such a non-natural person the obligations of an employer in relation to the worker as described above.

128. Accordingly, I conclude that the MOHLTC could be a supervisor within the meaning of the OHSA, notwithstanding the fact that it is not a natural person.

129. Whether the MOHLTC is a supervisor also requires consideration the decision of the Superior Court of Justice in *Abarquez v. Ontario*, [2005] O.J. No. 3504 (SCJ), and of the subsequent appeal of that decision to the Ontario Court of Appeal, [2009] O.J. No. 1814, leave to appeal refused [2009] S.C.C.A. No. 297. As the Court of Appeal decision was released subsequent to the conclusion of the hearing in this matter, the parties were provided with an opportunity to make post hearing submissions on this decision.

130. As noted above in the discussion of "employer", *Abarquez* concerned a claim in negligence brought by a number of nurses against the Crown in relation to the SARS crisis. The

statement of claim alleged, among other things, a duty of care on the part of the Crown towards the nurses on the basis that Directives issued by the MOHLTC rendered the Crown an employer or supervisor of the nurses within the meaning of the OHSA. The Superior Court struck the claim based on the assertion that the MOHLTC was an employer of the nurses, but did not strike the claim that the MOHLTC was a supervisor, stating (at paragraph 17):

> On the other hand, I do not consider it plain and obvious that the Crown, through the Ministry of Health and Long-Term Care was not acting as a "supervisor" in the circumstances of this case where the Ministry issued directives that governed not only the equipment – such as the masks – and clothes nurses were to use or wear but also contained extensive and detailed precautionary measures they were required to take when attending – and after attending – to patients. For the purposes of this motion, I am not prepared to exclude the possibility that the Crown would be found at trial to be a supervisor to whom the statutory duties and standards [under the OHSA] applied.

Implicit in the Superior Court's reasons is the conclusion that the mere fact that the Crown is not a natural person was not sufficient to compel the conclusion that it could not be a "supervisor" within the meaning of the OHSA.

131. The Crown appealed from the decision of the Superior Court not to strike the claim that it was acting as a supervisor within the meaning of the OHSA towards the nurses in relation to the SARS directives. No cross appeal was taken from the decision of the Superior Court striking the claim that the Crown was acting as an employer within the meaning of the OHSA. The Court of Appeal struck the claim that the Crown was acting as a supervisor. The Court of Appeal stated:

> [33] The hospitals that employed the nurses, supervised their day-to-day working conditions and bore immediate responsibility for the safety of their workplace are autonomous entities under the *Public Hospitals Act*, R.S.O. 1990, c. P.40. I agree with Ontario's submission that it is plain and obvious that the Directives issued during the SARS crisis could not alter the legal autonomy of the hospitals or amount to an assumption of control by Ontario over their day-to-day operation. The general power to mandate standards for the control of infectious diseases simply cannot be equated with the kind of direct involvement in the day-to-day management of employees that being an employer or supervisor entails. The Directives to the hospitals may well have had an impact upon workplace safety but that is far removed from taking "charge" over a workplace or assuming employer-like "authority" over a worker. Ontario is simply is too far removed from the day-to-day operation of the hospitals and the day-to-day working conditions of nurses to be a supervisor under the OHSA.
>
> [34] Having "charge of a workplace" so as to become a supervisor involves "hands-on authority" akin to that exercised by an employer: *R. v. Walters*, [2004] O.J. No. 5032, 67 W.C.B. (2d) 838 (S.C.J.), at para. 18; *R. v. Adomako*, [2002] O.J. No. 3050, 55 W.C.B. (2d) 266 (C.J.) ("*Adomako*"), at paras. 17-18. Having "authority over a worker" so as to become a supervisor includes the authority to promote workers, discipline workers, schedule work, deal with employee complaints, grant employees' leaves of absences and determine how an individual is paid: *R. v. Furtado*, [2007] O.J. No. 3122, 2007 ONCJ 368, at

> para. 25; *Adomako*, at para. 17. It is not pleaded that Ontario exercised functions of this nature and quality in relation to the plaintiffs.

132. I note first that the Court of Appeal left unchallenged the implicit conclusion that a non-natural person could be a supervisor. Indeed, in stating that the "hospitals that employed the nurses, supervised their day-to-day working conditions" the Court appears to have contemplated that the hospitals, non-natural persons, were the nurses' supervisors.

133. Second, I do not understand the Court of Appeal in *Abarquez* to be stating that a person must have all of the enumerated instances of authority in order to be a supervisor within the meaning of the OHSA. While a supervisor has to have authority akin to that of an employer, a supervisor is not an employer and thus need not have all of the characteristics of an employer. For example, a person who does not have the authority to promote or grant a leave of absence to a worker may still exercise sufficient authority over a worker to be a supervisor within the meaning of the OHSA.

134. I note in this respect that the definition of supervisor under the OHSA does not reference "managerial functions": that is, the definition of supervisor under the OHSA was not modelled on the long standing language of the *Labour Relations Act* with respect to managerial "exclusions". The reason for this is, of course, that the OHSA and the *Labour Relations Act* serve different purposes. The *Labour Relations Act* is concerned with excluding from bargaining units individuals who have the power to materially affect the terms and conditions of employment of their fellow employees, on the basis that they would be in a conflict of interest. The OHSA, on the other hand, is concerned with whether a person has sufficient authority over a worker or control of the workplace that they may affect the health and safety of the worker.

135. I am strengthened in this conclusion by the fact that one of the cases relied upon by the Court of Appeal in *Abarquez* is *R. v. Walters*. In that case a "lead hand" of a four person City of Toronto grounds crew was found to be a supervisor within the meaning of the OHSA on the basis that he assigned work, answered questions, had influence over who was assigned to him and was expected to address safety issues in the workplace. There was no suggestion, and it appears unlikely given his role and the employer in question, that he had for example the power to hire, fire, discipline or promote. The court in *Walters* found that the person in question had sufficient authority over the workers, or in the alternative had charge of their workplace, so as to constitute him a supervisor within the meaning of the OHSA.

136. Further, in my view, for the purposes of the OHSA a supervisor of a worker need not necessarily be an employee of the same employer of which the worker is an employee. This follows from the expanded definition of employer under the OHSA. If, for example, a contractor is the employer of a worker who is an employee of a subcontractor with which it has undertaken to perform work or supply services, then an employee of that contractor may be a supervisor, for the purposes of the OHSA, of that worker. Thus, a site superintendent of a general contractor on a construction project has the responsibilities of a supervisor to all of the workers on the site, notwithstanding the fact that most will not be employees of the general contractor. Indeed, *R. v. London Excavators & Trucking Ltd.*, discussed earlier, is illustrative of this kind of fact scenario. It is also noteworthy in this respect that while such a supervisor has powers "akin" to those of the employees' employer, such powers are indirectly exercised: a site superintendent employed by a general contractor may advise a subcontractor that one of its employees is barred from the site, with the result that the subcontractor may terminate, reassign or lay off the employee in question.

137. In addition, there is nothing on the face of the definition of "supervisor" which would limit it to a person whose employer stands in the relationship of employer to the workplace or worker in question. For convenience, I set it out again:

> "Supervisor" means a person who has charge of a workplace or authority over a worker;

Thus, the definition of supervisor is broad enough to encompass a person with "authority over a worker" or "who has charge of a workplace", whether or not that person's employer stands in the relationship of employer to the worker or workplace in question, or indeed whether or not the person has an employer themselves. That is, the question is not the source of the authority, but the nature of the authority exercised. A person employed by the worker's employer in a supervisory capacity will, by virtue of that relationship, have the requisite authority. But it may be, in rare cases, that a person not employed by the worker's employer might nonetheless exercise such authority over the worker that they will be a "supervisor" of the worker for the purposes of the OHSA. I note that this conclusion, too, is implicit in the decision of the Superior Court in *Abarquez*, and was not challenged by the decision of the Court of Appeal in that case.

138. Given that the MOHLTC is not employed as a supervisor by Essex, the issue is whether it otherwise has the requisite "authority" over the paramedics or "charge" of their workplace in order to fulfill the obligations of a supervisor under the OHSA in relation to the paramedics.

Does the MOHLTC have "charge of the workplace" of the paramedics so as to render it a supervisor within the meaning of the OHSA?

139. "Workplace" is itself a defined term under the OHSA:

> "Workplace" means any land, premises, location, or thing at, upon, in or near which a worker works.

I agree with the MOHLTC that this definition is describing a physical place.

140. CUPE argues that the workplace of the paramedics is the ambulances which they drive. There is no dispute that the ambulances are owned, maintained and operated by Essex. The MOHLTC staff are not physically present in the ambulances. Thus, to the extent that the MOHLTC has charge over the workplace of the paramedics this comes from the authority it exercises over the paramedics, which is the second part of the definition of supervisor.

Does the MOHLTC have "authority over" the paramedics so as to render it a supervisor within the meaning of the OHSA?

141. For the reasons stated above with respect to the MOHLTC as employer of the paramedics, to the extent that the MOHLTC's authority over the paramedics is an exercise of its funding or regulatory functions, it cannot constitute the MOHLTC a supervisor within the meaning of the OHSA. Thus, the conclusion that the MOHLTC is a supervisor of the paramedics within the meaning of the OHSA must be founded, if at all, in its operational functions with respect to communications equipment and dispatch services.

142. There is, in any event, another reason why only the operational functions of the MOHLTC are relevant to the determination of whether or not it is a supervisor in this case. As stated above, in my view there is a relational component to the definition of supervisor: the MOHLTC is a supervisor, if at all, only in relation to the authority that it exercises over the paramedics. Thus, to find that the MOHLTC has the obligations of a supervisor to the paramedics with respect to a specific issue requires the conclusion that it has authority over the paramedics with respect to that issue.

143. Broadly speaking, there are six issues over which CUPE and Essex assert that the MOHLTC has the obligations of a supervisor in relation to the paramedics:

(a) provision of a second portable radio;

(b) control of the testing of the emergency button on the portable radios;

(c) the functionality of the communications system provided;

(d) deciding whether to provide a preventative maintenance program for the radios;

(e) control of the use of the mike to mike function on the cell phones; and

(f) use of the communications system to "flag" potentially hazardous addresses.

144. There is simply no question that the MOHLTC exercises complete and exclusive control over the communications system which it requires the paramedics to use. The MOHLTC provides the communications system in its operational capacity and its exclusive responsibility in this respect means that it effectively requires the paramedics to use it. More particularly, the MOHLTC exercises complete and exclusive control with respect to the provision of a second radio to the paramedics: Essex's offer to pay for a second radio was rebuffed. Similarly, the MOHLTC exercises complete control over whether and when the emergency button on the radios will be tested. The functionality of the communications system provided is a product of the GMCP of which the MOHLTC, and not Essex, is a partner.[1] If one were required, the provision of a preventative maintenance program for the radios would also have been a matter within the exclusive control of the MOHLTC or the GMCP. The MOHLTC has determined that the mike to mike function on the cell phones will not be used. Finally, the MOHLTC has determined that the communications system will not be used to flag potentially hazardous addresses, even as a conduit of information provided by Essex, or the police.

145. The issue, as described by the Court of Appeal in *Abarquez*, is whether this control is akin to the kind of authority over a worker exercised by an employer. In my view it is. With respect to the communications system, a critical tool integral to the paramedics' work throughout the course of their shifts, the MOHLTC has determined which system they must use, which specific tools will be provided, whether enough tools (i.e. portable radios) will be provided so that each paramedic has one

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[1] I note again in this respect that while I have adopted the parties' practice of identifying MOHLTC as the party to these proceedings, the proper party is the Crown in Right of Ontario. Thus, while the GMCP is not coterminous with MOHLTC, both are part of the Crown in Right of Ontario.

while working, whether parts of the system will be maintained or tested and how the system will be used, in the sense of what information may be transmitted over it. This control is "hands on". It is direct. It is day-to-day. Further, it is not simply that the MOHLTC has the effective power of discipline over paramedics in relation to this communications system and its uses, but the paramedics literally cannot work unless they use that communications system. Perhaps most importantly, this control over the paramedics is exclusive: there is nothing that their employer, Essex, or any of its employees, can do about it. If an employee of Essex exercised this degree of control over the paramedics, surely there could be no question that he or she was a supervisor of the paramedics within the meaning of the OHSA. In the unusual circumstances of this case, the fact that the MOHLTC is not the employer of the paramedics, or employed by an employer of the paramedics, does not detract from the very real work related authority which it exercises over them.

146. Finally, I note that I do not accept the suggestion in the submissions of the MOHLTC that the facts in this case can be analogized to the facts in *Abarquez*. In *Abarquez*, the Court of Appeal held that the fact that the MOHLTC had exercised its "general power to mandate standards" to issue Directives to hospitals during the SARS crisis could not constitute it a supervisor of nurses employed by the hospitals. While the MOHLTC has a regulatory power in relation to Essex, and other ambulance service operators, and indeed has exercised it to mandate detailed standards with respect to communicable disease management and influenza control in the "Ambulance Service Patient Care and Transportation Standards" as discussed earlier in this decision, the control at issue here arises not from the MOHLTC's regulatory functions over the paramedics, and Essex, but from its operation of the communications system.

147. In the result, if I am wrong that the MOHLTC has the obligations of an employer in relation to the paramedics as described above, I conclude that the MOHLTC has the obligations of a supervisor under the OHSA to the paramedics in relation to the communications system it has provided to them and requires them to use, and the manner in which it permits it to be used in communications with the paramedics.

Has the MOHLTC breached obligations as an employer under the OHSA in relation to the paramedics?

Introduction

148. The Inspector, CUPE and Essex argue that the MOHLTC has breached its obligations as an employer in relation to the paramedics under sections 25(1)(b), (2)(a) and (h) of the OHSA with respect to a number of issues. For convenience, I set those sections out again:

> 25. (1) An employer shall ensure that,
>
> ....
>
> (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
>
> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
>
> ....

> (h) take every precaution reasonable in the circumstances for the protection of a worker;

149. I turn now to consider each of the issues raised by the Inspector, CUPE and Essex in turn.

The FleetNet Radio Communications System

150. CUPE and Essex argue that the MOHLTC has breached its obligations as an employer of the paramedics by failing to inform them of known "defects" in the communications system. They seek a declaration and an order directing the MOHLTC to provide the Occupational Health and Safety Committee with a summary of all known "defects" in the system that "may cause paramedics to lose their ability to communicate and a summary of all investigations being undertaken by the contractors responsible for the communications system and the results of such investigations quarterly".

151. As discussed above, the MOHLTC provides the communications system in its operational capacity and its exclusive responsibility in this respect means that it effectively requires the paramedics to use it. There is complete integration of the spheres of operation of the MOHLTC and Essex in this respect. As it bears as well on some of the other issues to be discussed, it is useful to describe this system in some detail.

152. The current radio communications system is commonly referred to as FleetNet. It is a product of the Government Mobile Communications Project (GMCP), for which the Government Mobile Communications Office (GMCO) is responsible. The GMCP was approved by Management Board of Cabinet in 1998. It was a joint project of the affected ministries, including the MOHLTC. The objective of the GMCP was to create a province-wide common communications network for all Ontario based public safety organizations, including hospitals and emergency medical services, the Ontario Provincial Police, and some functions of the Ministry of Transportation, the Ministry of Correctional Services and the Ministry of Natural Resources. This was done by entering into agreements with private sector partners. Bell Mobility Radio was the prime contractor, and FleetNet is the name which it attaches to the communications system.

153. The system as a whole is a complex undertaking. Smiles testified that the total cost of this project, across all participating ministries, was probably over $100 million. Battiston testified that there are about 172 tower sites, 30 to 40 dispatch systems, and approximately 20,000 vehicle units in the system. Duffin testified that there were approximately 1,200 ambulances across the province using the system and another 350 to 400 emergency response vehicles. Duffin also testified that in 2007 there were approximately 1.2 million calls dispatched to emergency medical services across the province.

154. I pause to note that, as alluded to above in the summary of the parties' arguments on the employer issue, the MOHLTC argues that the complex, interrelated nature of the communications system, and its province wide scope, are a reason not to make an order, since the order will have only local application (i.e. apply only to Essex). Parts of this argument rest on a premise that I have rejected: that the Minister's functions under the *Ambulance Act* are purely regulatory. As discussed above, in my view it is more useful to describe the functions as regulatory, funding and operational. The functions at issue here are operational. In addition, I do not accept as a proposition of law that

complexity, interrelatedness or the province wide scope of a system exempts such a system from the application of the OHSA. That is not to say that such considerations are irrelevant. But their relevance is a question of fact, not law. Therefore, it is to the facts in evidence before me that I return.

155. FleetNet was rolled out across the Province over a number of years commencing in or about 2002, replacing existing, or "legacy" systems. Some of the evidence addressed problems with the legacy system in Essex and transitional problems with the introduction of FleetNet which have been resolved. As such they are no longer relevant to any order that this Board might make and I note that none of the final submissions of the parties addressed these issues. Only passing reference to these problems will be made to address the concern of CUPE and Essex that they represent "defects" in the system.

156. FleetNet is a "trunked" communications system. This means that instead of a particular channel in an area being assigned to a particular group of users, e.g. the emergency medical services or the police, all channels are pooled and available to all users. This is based on the theory that not all users will need to use the radio at the same time and communications will be of short duration. Users are grouped into "TalkGroups". Thus, Essex paramedics are grouped into various TalkGroups, for example, there is a TalkGroup for Windsor City proper, another TalkGroup reserved for tactical operations etc. All users in a particular TalkGroup operate on the same channel at a particular point in time. However, because of the trunked nature of the system, they will not necessarily use the same channel at each point in time. The channel which they use is selected by the system on each transmission from the available channels shared with other users of the system. If there is no available channel at the time of a transmission then they would hear a "bonk" signal, indicating that access has been denied.

157. The issue of access denial resulted in CUPE and Essex leading some evidence which reflected their understanding that the Ontario Provincial Police were given priority access to available channels. That is, CUPE and Essex believed that one reason paramedics were getting "bonk" signals was that the Ontario Provincial Police was being given priority. Technical evidence led by the MOHLTC suggested that this is not the case. In particular, the technical evidence indicated that while priority access is given to some users over other users to available channels, the distinction is not on the basis of police over, for example, paramedics, but on the basis of front line users over administrative users. Paramedics and police are both considered front line users and get the same top priority access to available channels.

158. Each ambulance is equipped with a mobile radio, a "vehicular repeater" (both of which are affixed to the vehicle) and, at present, one portable radio, with attached lapel speaker/microphone, which one member of the crew carries with him or her when the crew exits the ambulance. (In this decision, I have, as had the parties, used the term "portable" to refer to both the portable radio and the attached lapel speaker/microphone unless the context suggests otherwise.) The mobile radio communicates with the CACC, or dispatch, by VHF signals. The portable sends a UHF signal to the vehicular repeater, which converts it to a VHF signal and sends the signal to the CACC through the mobile.

159. The portable and the mobile are on different signals (i.e. UHF and VHF respectively) in order to minimize the possibility of interference between them. VHF signals are capable of transmission over a greater distance than UHF signals.

160. The current system represents an improvement over the previous system in a number of respects, the most notable of which is that the portables are now equipped with emergency buttons, both on the portable itself and on the remote speaker/microphone attached to the portable and designed to be worn in the lapel area. Pressing the emergency button results in a UHF signal being sent to a repeater, where it is converted to a VHF signal and transmitted to dispatch by a mobile. (There are also two emergency buttons located in the ambulance itself.)

161. When FleetNet was first rolled out in Essex, the emergency buttons were not activated for a variety of technical reasons. The fact that the emergency buttons were not initially operational was one of the transitional issues. It has been resolved with the activation of the emergency buttons.

162. It is also worth noting at this point that a separate channel is reserved on the trunked communications system for emergency signals: that is, transmission of emergency signals is not dependent on one of the pooled channels on the trunked communications system being available.

163. Problems can arise when a UHF signal is sent by a portable or an emergency button on the portable or attached speaker/microphone. The signal is received by the repeaters on all ambulances within the transmission range. If two or more repeaters were to attempt to transmit the same signal to dispatch at the same time technical problems can occur. In particular the mixing of the two signals, or heterodyning, results in interference, or "noise" in the transmission. This was a problem with the portables in the legacy system.

164. Accordingly, the FleetNet system was designed to reduce the frequency of this happening. As I understand it, this is accomplished essentially in two ways. First, the mobile/repeaters in the ambulances have two modes: "mobile" mode and "system" mode. Only when a mobile/repeater is in system mode does it attempt to retransmit a signal from a portable to the CACC. Ambulance crews are instructed to leave their radios in mobile mode unless at an incident scene. Second, the FleetNet system has a contention algorithm called the Simulcast Prevention Algorithm (SPA). In essence, when more than one repeater in system mode receives signals from a portable radio, the SPA causes all of the affected repeaters to attempt to communicate with each other and to automatically elect one unit to be the "master" or "prime", on the basis of, among other things, strength of signal. The master is allowed to transmit on the repeater channel, while the others are not. The master unit is determined on each transmission.

165. There are still problems with the FleetNet system. Of particular concern to CUPE and Essex is the fact that the signal sent by a portable or the emergency buttons on the portable is identified when received by the CACC not with the portable but with the repeater/mobile unit which forwarded the signal to dispatch (there is a unique four digit vehicle code associated with each repeater/mobile unit). The operation of the SPA means that the repeater/mobile which forwards the signal is not necessarily the repeater/mobile located in the ambulance to which the crew is assigned. This is particularly problematic when the emergency button is being used for two reasons. First, for the purposes of receiving an emergency button signal, all mobiles/repeaters in the transmission area, currently set at about 1.7 kilometres, that can pick up the signal act as if they are in system mode. This could include an ambulance driving through the area whose crew had their mobile/repeater in mobile mode. Thus, one of a number of ambulances other than the one whose crew sent the signal may be identified as the source of the emergency signal which has been forwarded to the CACC.

166. Second, when an emergency button on a portable is used, the portable radio awaits an "acknowledgement" that the signal has been received by a repeater. If it does not receive that acknowledgement within several seconds, it automatically resends the emergency signal. If an acknowledgement is not received with respect to the resent signal, the portable will then override the SPA so that all repeaters in the area can receive the signal. If this were to happen, from the perspective of the CACC it could appear that there were multiple emergency alarms coming from multiple repeaters.

167. Ideally an emergency signal would be associated with the portable radio from which it was sent. CUPE and Essex consider this to be another "defect" in the system. However, the uncontradicted evidence of the MOHLTC was that it has been advised by existing suppliers that this cannot be done based on current technology.

168. In addition, the problem of heterodyning can still occur with FleetNet. One situation in which this can occur is when a portable can transmit to two repeaters, but the two repeaters are unable to transmit to each other, with the result that the SPA does not operate to prevent heterodyning. This can happen, for example, if a crew with the portable is on an upper floor of a high rise building in an area with a number of other buildings. The portable has a clear line of transmission to each repeater but the presence of the other buildings impedes the transmission between repeaters.

169. This problem could be compounded by the possibility that the mobile/repeater in an ambulance can be placed in system mode without the crew in that ambulance having done so. The portables have a button which if pushed places all repeater/mobiles in transmission range on system mode. In these circumstances, unlike when an emergency button temporarily overrides the SPA and in effect places all repeater/mobile in system mode, the repeater/mobile remains in system mode until reset by the crew in the ambulance.

170. In my view, the problems identified are not properly described as "defects" in the system. Rather they are technological limitations of the system. There is no basis for concluding that the communications system as a whole has not been "maintained in good condition". Accordingly, I find no breach of section 25(1)(b).

171. However, ensuring the paramedics understand the technological limitations of the communications system which they are required to use is a reasonable precaution in the circumstances for ensuring their health and safety. I note that the MOHLTC has attempted to explain the system, and its limitations, to the paramedics in the past through training sessions, albeit the MOHLTC's own understanding of the system and its limitations has also evolved and it is not clear that the paramedics have been updated in this respect. To the extent that MOHLTC has provided training to paramedics, however, it has been a product of its own goal of ensuring that the paramedics know how to use the system.

172. I find that pursuant to its obligations as an employer under section 25(2)(a) to provide information, instruction and supervision to a worker to protect the health and safety of the worker, the MOHLTC is required to ensure that paramedics understand the technological limitations of the communications system which it requires them to use by providing appropriate training or otherwise. I also find that the MOHLTC is obliged to do this pursuant to its obligations as an employer under section 25(2)(h) of the OHSA to take every precaution reasonable in the circumstances for the protection of a worker.

Preventative Maintenance of the Radios

173. CUPE and Essex MOHLTC argue that the MOHLTC has breached its obligations as an employer in relation to the paramedics by failing to inform them that there is no preventative maintenance program for the communications equipment. They seek a declaration and an order directing the MOHLTC to arrange for a program of preventative maintenance of all communications equipment used by the paramedics.

174. It is correct that the MOHLTC has no program of preventative maintenance on the lapel microphones, portables, mobiles or repeaters. However, none is suggested by the manufacturers of these items.

175. Further, there was no evidence of any problem with the communications system which a preventative maintenance program would address. The system and its components either work or do not work. The issue is not one of preventative maintenance but of periodic testing and examination of the components for obvious defects. In this respect Landry gave evidence that there is an exposed part of the lapel microphone/speaker which is subject to wear or damage. If this happens, it makes it easier for the emergency button on the lapel microphone/speaker to be activated by accident, causing false alarms. In 2007, 10 – 12 lapel microphone/speakers were replaced for this reason.

176. Accordingly, based on the evidence before me, I decline to make an order with respect to the preventative maintenance of the communications system used by the paramedics.

Testing of Emergency Buttons

177. The Inspector, CUPE and Essex argue that the MOHLTC has breached its obligations as an employer in relation to the paramedics by failing to provide for the testing of emergency alarm buttons. CUPE and Essex seek a declaration and an order directing the MOHLTC to develop a protocol for the daily testing of all emergency buttons at, or close to, the commencement of each shift.

178. As noted in the description of the communications system, there is an emergency button on the lapel microphone attached to the portable, an emergency button on the portable proper, and two emergency buttons in each ambulance. Pushing an emergency button should result in it sending a signal over a particular frequency. These devices have a reference oscillator alignment which aligns the signal with the desired frequency. The only way to ensure that the emergency button is sending the signal at the desired frequency is to test it.

179. The MOHLTC does not take the position that there is never any need for testing of the emergency button. Indeed, both the Acting Deputy Director of the GMCP and the Field Manager of the Southwest Field Office, EMS Branch of MOHLTC, testified that the emergency buttons should be tested. Rather it takes the position emergency button testing is properly the subject of local protocol to be agreed upon by each emergency medical service and the CACC with which that emergency medical service works. It appears that the MOHLTC has delegated this responsibility to the Windsor CACC.

180. Bildfell, the Director of Land Ambulance Services, County of Essex-Windsor and City of Windsor and Krauter, the Manager of the Windsor CACC have been unable to reach an agreement on

a protocol. Krauter, on behalf of the Windsor CACC, proposed that testing only be initiated by the ambulance service fleet supervisor and the ambulance service health and safety representative in cooperation with the CACC Supervisor and that testing would not be allowed to interfere with the "normal operational activities" of the CACC. Bildfell testified that he did not sign the agreement because in his view a paramedic should have the right to test an emergency button at any time in conjunction with the CACC dispatcher.

181. While the MOHLTC has recognized the desirability of the testing of the emergency buttons, the parties have been unable to reach an agreement as to a protocol. These discussions, however, have taken place on the premise that the MOHLTC does not have an obligation under the OHSA to ensure testing of the emergency buttons. In my view, it does.

182. The ability of the paramedics to test the emergency buttons is controlled by the MOHLTC as part of its operational functions. Accordingly, the MOHLTC has the obligations of an employer in relation to the testing of the emergency buttons. Failure to test the emergency buttons gives rise to an actual or potential danger that the emergency buttons will not work. In my view, an employer which prohibits the testing of a component of equipment which it has provided is not ensuring that the component is maintained in good condition. Accordingly, I find that in refusing to permit the testing of the emergency buttons on the radios provided to the paramedics, the MOHLTC is violating its obligations under section 25(1)(b) of the OHSA. Failure to have in place a proper protocol for the testing of the emergency buttons also constitutes a failure to take every precaution reasonable in the circumstances. I find that pursuant to section 25(2)(h), the MOHLTC has this obligation in relation to the paramedics.

183. I also note that as an employer, Essex has obligations under the OHSA which parallel these obligations of the MOHLTC in relation to the testing of the emergency buttons.

184. In my view, it is appropriate to remit the development of a protocol for the testing of the emergency buttons to the MOHLTC and Essex so that they may attempt to reach an agreement based on the understanding that they share legal responsibility under the OHSA for developing such a protocol as a reasonable precaution for the health and safety of the paramedics. To assist them in those discussions, I also note that in my view the operational difficulties for the CACC associated with the testing of the emergency buttons form part of the circumstances within which the reasonableness of such a precaution is to be assessed.

185. Accordingly, I direct the MOHLTC and Essex to attempt to reach an agreement on a protocol for the testing of the emergency buttons on the radios provided to the paramedics by the MOHLTC within thirty (30) days of this decision and to advise the Inspector of any agreement reached. In the event that the parties are unable to reach an agreement, they are to advise the Board within sixty (60) days of this decision, failing which this aspect of the application will be deemed to have been resolved. If the parties advise the Board that they have failed to reach an agreement, further directions may be given with respect to an expedited hearing process to determine this issue. The parties are advised that any such decision may be issued based on evidence and submissions already before the Board. I remain seized for this purpose.

The Second Portable

186. The Inspector, CUPE and Essex argue that the MOHLTC has breached its obligations as an employer pursuant to section 25(2)(h) to "take every precaution reasonable in the circumstances for the protection of a worker" by failing to provide each paramedic on duty with a portable radio with a working emergency button. CUPE and Essex seek a declaration and an order directing the MOHLTC to provide each paramedic on duty with a portable radio that has a working emergency button within 60 days. As noted at the outset of this decision, for the most part, during the hearing and in their submissions the parties used the short hand expression of the "second portable" to refer to this issue, and I have generally employed the same short hand.

187. The Inspector takes the position that the only thing which could relieve the MOHLTC of the responsibility to provide a second portable would be physical impossibility arising from limitations on the availability of additional channels. He seeks an order directing the MOHLTC to make suitable inquiries as to whether additional channels would be required prior to any order being made.

188. It should be noted that portable radios were first provided to ambulance crews in or about 1981. Prior to that time, ambulance attendants (as they were then called) did not have radio communication with their dispatchers once they left their vehicles. Further, the scale of issue of portables under the legacy system was also one portable per ambulance.

189. Each portable, along with associated spare batteries, licensing, programming costs etc. costs approximately $1,500. Approximately 35 additional portable radios would be required in order to ensure that every paramedic in Essex had a portable while on shift. The cost of doing so would be approximately $52,500.

190. The issue of a second portable has been the subject of joint recommendations of the Occupational Health and Safety Committee of the County of Essex Emergency Service since 2002. Essex, as employer, has concurred with this recommendation and requested that the MOHLTC provide a second portable. The MOHLTC has declined. Further, the MOHLTC has refused Essex's offer to provide or pay the cost of providing a second portable to its paramedics.

191. The rationale for the provision of a second portable radio is strongly, although not exclusively, linked to the availability of emergency buttons to each of the paramedics on a crew: if each crew member has his or her own portable radio, then each crew member has two emergency buttons (one on the portable and one on the speaker/microphone) on his or her person. Conversely, at present the paramedic not carrying the portable radio has no emergency buttons on his or her person. Essex and CUPE argue that paramedics face potential violence on a daily basis and that equipping each paramedic with a portable, and associated emergency buttons, is a reasonable safety precaution in the circumstances. The MOHLTC argues that the evidence shows that on the current scale of issue, the emergency button has worked and that there is no evidence that a second portable radio would help.

192. The MOHLTC notes that in the incident involving the Windsor Casino, which was the most complex situation, it took only 35 seconds from receipt of the emergency signal at the CACC until police were dispatched and that in a more ordinary situation, where the emergency signal is only

associated with one ambulance the evidence was that it would take only 10 to 15 seconds on average to dispatch police.

193. The hazards faced by the paramedics were reviewed earlier in this decision. I am satisfied that in the ordinary course of their duties paramedics may be, and are, dispatched to calls where the patient or other individuals on site may become violent and pose a risk to the health and safety of the paramedics. I am also satisfied that in the course of their duties paramedics may, and do, become separated so that the paramedic not carrying the portable radio will not have access to an emergency button. I am further satisfied that in the event of an altercation involving the paramedic with the portable radio, that paramedic's ability to disengage him or her self in order to depress the emergency button may be, and has been, impeded, a problem which would be addressed if the other paramedic on the crew were present and also had a portable radio.

194. I also note that a second portable mitigates risk not simply by providing each paramedic with a set of emergency buttons, but in several other ways. First, the second portable may also be used for oral communications, in order to provide information about the emergency situation faced by the paramedics. Second, the second portable effectively acts as a spare: as noted earlier, during the discussion of the fact that no preventative maintenance program is indicated for the radio communications system, its components either work or do not work. Thus, in the event that one portable does not work, the portable carried by the other crew member could be used.

195. Thus, I am satisfied that a second portable would reduce the risks to the health and safety of the paramedics. In my view, however, it does not automatically follow that a second portable must be provided to the paramedics. The MOHLTC's obligation as an employer pursuant to section 25(2)(h) is to "take every precaution reasonable in the circumstances for the protection of a worker". In interpreting this obligation, the Board made the following statement, with which I agree, in *Ontario (Ministry of Transport)*, [2006] OLRB Rep. Mar./Apr. 196 (April 4, 2006):

> 146. There is surprisingly little case law on what the word "reasonable" in s. 25(2)(h) means. However, on the face of the provision the word "reasonable" clearly modifies the words "take every precaution in the circumstances". Therefore, it is not every precaution which must be taken, but only reasonable precautions. Determining what is reasonable involves balancing the benefit to be gained by taking the precaution against all other relevant factors. These factors could include, among other things, the cost of the precaution and its effect on efficiency.

In this case, however, for the reasons that follow I am satisfied that the reasonableness of the precaution of providing a second portable has been recognized by the MOHLTC through its treatment of funding proposals in relation to this issue.

The Significance of the Funding Proposals

196. Management Board establishes funding priorities for the Government of Ontario through a process referred to as "Results Based Planning". Each Ministry solicits funding requests from its branches and evaluates and prioritizes them. The Ministries in turn submit their funding requests to Management Board which evaluates and prioritizes them. Not all requests receive funding.

197. Several documents were filed on consent relating to requests in the Results Based Planning exercise for a second portable radio. While he had no direct knowledge, Duffin, the Field Manager for the Southwest Field Office of the Emergency Medical Services Branch of the MOHLTC, testified that these documents indicate that a request for funding for a second portable was made by the MOHLTC to Management Board or by the Emergency Health Services Branch to higher levels within the MOHLTC. The documents establish that essentially identical requests were made in the 2003/4 and 2004/5 Results Based Planning exercises. The text of the 2004/5 request is as follows:

> **2004/05 RBP Risk Template**
> Operational requirements of Ontario's emergency medical services requires changing the scale of issue from one portable radio to two portable radios assigned to each emergency ambulance. This need was echoed in a recent inquest jury recommendation (Whitmore/2002). The purchase and supply of communication (radio) equipment is a legislated responsibility of the Province.
>
> Each emergency ambulance is staffed by two paramedics but with only one portable radio assigned to each ambulance, only one of the paramedics has immediate access to portable emergency communications with dispatch. Frequently crew members are apart when attending multiple patients; should a patient become violent or need additional medical assistance, the paramedic without a radio is unable to radio for help.
>
> Implications of Risk:
> - Failure to comply with an inquest recommendation (likelihood 100%);
> - At cross-purposes with ministry's land ambulance Response Time Improvement strategy (likelihood 50%);
> - Jeopardize public health and safety and the safety of paramedics. Without immediate radio access, the delayed activation of emergency assistance when required greatly increases the likelihood of injury or loss of life to the paramedic or patient. As call volumes increase, so does the likelihood of this risk materializing. Any injury or loss of life to a paramedic or patient affects family, co-workers, and public confidence and, if shown to be directly linked to a lack of portable radio assignment, will seriously reflect negatively upon the government (likelihood 30%).
>
> Mitigating Strategies:
> Instruct crew members to maintain line of sight or stay within voice range, or commit additional ambulances in response to each emergency call.
>
> Neither solution is practical in the long term and both increase operational costs. In addition, the dispatching of multiple ambulance [sic] to a single call would rapidly deplete municipal ambulance resources with a corresponding increase in overall ambulance response times to emergencies.

The cost of purchasing a second portable for all ambulances in the province was estimated by these documents at just under $1.5 million, with ongoing costs of approximately $67,000 per year.

198. CUPE and Essex point to these documents as virtual admissions by the MOHLTC that failure to provide each paramedic with a portable radio "greatly increases the likelihood of injury or loss of life to the paramedic", to use the language of the funding proposals. Counsel for the MOHLTC concedes that in putting forward this budget submission the MOHLTC must have considered that money on a second portable radio would be "usefully spent". He argues, however, that other than reference to the inquest recommendation there is no indication in the budget submission of any actual problem which would arise from continuing to have a scale of issue of one portable radio per ambulance. Thus, he argues, the MOHLTC's request for a second portable is based on little more than speculation or opinion that a second portable may be of assistance in addressing health and safety issues in an unforeseen set of circumstances.

199. I am not persuaded by this argument. It may be that the assessment of risk to the paramedics associated with the failure to provide each of them with a portable radio can be understood as nothing more than speculation or opinion on the part of the MOHLTC. This, however, is not the most reasonable explanation, as one would hope that funding requests to cabinet are based on something more than speculation. At the very least the explanation offered by counsel for the MOHLTC is only one of several inferences that can be drawn as to why the statement was made in the funding request. An alternative inference is that the MOHLTC, or the EMS Branch of the MOHLTC, concluded based on its own assessment that failure to provide each paramedic with a portable represented a reasonable enough risk to their health and safety that a request for funding to Management Board should be made. In these circumstances, the failure of the MOHLTC to adduce evidence as to why this specific request was made gives rise, in my view, to this alternative adverse inference.

200. The nature of this document, however, raises the issue of whether a decision of the Board, or of an Inspector, under the OHSA can or should interfere with government decisions on funding priorities. The MOHLTC argues that the decision not to fund a second portable radio constitutes a "considered government decision" with respect to the expenditure of $1.5 million, and on this basis urges the Board not to disturb this decision.

201. In reply, the Inspector argues that the GMCP is not a creature of statute, in particular as it relates to the provision of a second portable radio, noting that there is nothing in the statute or the regulations which directs the MOHLTC with respect to how many portable radios it should be issuing. Essex and CUPE argue that in running the communications system, MOHLTC is engaged in an operational function. In any event, they note that section 2(1) of the OHSA provides that it binds the Crown and that section 2(2) of the OHSA provides that despite anything in any general or special Act, the provisions of the OHSA and its regulations prevail.

202. The lack of fuller argument on this point caused me great concern. In the end, I have concluded that the mere fact that the government has made what is arguably a policy decision not to expend funds to provide a second portable does not deprive this Board of jurisdiction to order it to do so. I note in this respect, first, that the MOHLTC did not argue that the Board could not override this decision, only that it should be cautious about doing so, and in its submission should not do so.

203. Second, there are cases in which the government has been ordered to take precautions under the OHSA notwithstanding the fact that the decisions had budgetary implications. (See for example: *Ontario (Ministry of the Solicitor General and Correctional Services)*, [1998] O.O.H.S.A.D. No. 199 (August 4, 1998) (Wacyk) (ordered, inter alia, to increase staffing

complement, provide equipment, including a communications system to enable emergency calls to the police, to correctional officers escorting inmates at various correctional facilities); *Ontario (Ministry of the Solicitor General and Correctional Services)*, [1997] O.O.H.S.A.D. No. 2 (Muir) (January 17, 1997) (ordered to increase staffing complement in "control module" at the Sault Ste. Marie Jail); see also *Ontario (Ministry of the Solicitor General and Correctional Services*, [1997] O.O.H.S.A.D. No. 319 (Cummings) (December 2, 1997), where the adjudicator was prepared to order the government to buy additional portable radios in order to ensure that there was sufficient supply to provide every correctional officer at the Sault Ste. Marie Jail with one while on duty.)

204. Third, the Crown is expressly made subject to the OHSA. In doing so, the OHSA makes no distinction between policy and operational activities of the Crown. That is not to say that the fact that the Crown has made a policy or funding decision will be irrelevant to determinations under the OHSA. In particular, in determining whether the Crown has taken "every precaution reasonable in the circumstances for the protection of the worker", the nature of the Crown activity is one of the circumstances to be considered. As stated above, the benefit to be gained by taking the precaution must be balanced against all other relevant factors. In this case, however, the only evidence before me was that the MOHLTC, or its Emergency Medical Services Branch, considered provision of a second portable necessary in order to redress the "greatly" increased likelihood of injury or loss of life to the paramedic if only one portable per crew was provided. There is no evidence what so ever as to why this funding request was rejected. Nor, as argued by Essex, was there evidence of competing priorities.

205. I also note that there was some suggestion in the evidence that providing a second portable radio could cause an increase in radio traffic which could result in degradation of overall communications service or could result in the need to obtain additional transmission capacity. If an increase in transmission capacity were required in an international border area, such as Essex, then a lengthy approval process involving Industry Canada and its counterpart in the United States of America, the Federal Communications Commission, would need to be followed. This evidence was, however, entirely speculative: the MOHLTC has done no studies to determine whether or not any such problems would occur. Further, the fact that the MOHLTC, or at the very least its EMS Branch which has responsibility for that communications service, requested a second portable for paramedics across the province, including in Essex, significantly undercuts the argument that this was seen as an actual problem.

206. In the result, I conclude that in failing to provide sufficient portable radios so that each paramedic in Essex may carry one while on duty the MOHLTC has breached its obligation as an employer pursuant to section 25(2)(h) of the OHSA to take every precaution reasonable in the circumstances for the protection of the paramedics. The MOHLTC is directed to provide sufficient portables to the paramedics employed by Essex within 60 days of the date of this decision.

Flagging of Potentially Dangerous Addresses

207. "Flagging", as the term was used in these proceedings, means identifying an address as one at which potentially dangerous individuals reside or may reside to paramedics dispatched to that address. Examples of such addresses were said to be a notorious motorcycle gang's club houses or "crack houses". The MOHLTC refuses to flag addresses.

208. CUPE and Essex take the position that the MOHLTC's failure to flag addresses is contrary to its obligations under the OHSA, but did not indicate which of the MOHLTC's asserted obligations it specifically breached. They seek a declaration and an order directing the MOHLTC, within sixty (60) days of the date of this decision, to incorporate into its ambulance dispatch service a system of flagging addresses which the Occupational Health and Safety Committee of the County of Essex Emergency Service deems to be potentially hazardous. They also seek to ensure that dispatch advises paramedics of the flagged addresses and the details of the flagging when sent to such an address.

209. The Inspector takes the position that the potential for violence constitutes a "hazard in the workplace". Accordingly, the Inspector takes the position that the MOHLTC has an obligation under section 25(2)(d) of the OHSA to "acquaint" the paramedics with this hazard. The Inspector argues that despite the paramount value assigned to health and safety, the OHSA carves out exceptions when it is necessary to protect the life of another person. Accordingly, the Inspector argues that the parties should be directed to go back and determine how best to use the system that exists to "flag" addresses.

210. It is perhaps useful to emphasize two things at this point. First, no party to these proceedings took the position that paramedics dispatched to an incident were not entitled to determine what action to take, or not take, based on their assessment of the risk of potential violence associated with responding to a particular call. In particular, the right of paramedics to decide to stand by and await the arrival of police assistance was not an issue in these proceedings. The locus of dispute was on the right of paramedics to make this decision based on anything other than "current" information. Second, flagging an address does not necessarily mean that the paramedics would always await the arrival of police assistance, only that they would be provided with address specific historical information which they would consider in deciding whether to await the arrival of police assistance or whether to enter the premises but proceed with caution. Indeed, I heard evidence of paramedics going into what they believed to be potentially violent situations without waiting for the police if they also believed that there was imminent danger to the life of the patient.

211. The issue of flagging requires some consideration of what information is currently available and provided by Windsor CACC dispatchers to paramedics with respect to potential dangers at a particular address to which they are being dispatched.

212. Calls are received by call takers at the CACC. The call takers assess the situation using a call taking protocol tool known as the Dispatch Priority Card Index. The Windsor CACC also has a set of Local Operational Procedures (LOPs) which its personnel are expected to follow. All calls to or from the CACC are recorded. In addition, call takers enter certain information into the Ambulance Report Information System (ARIS) as they are talking to the caller. A computer record for each call is created by address as a result. This information can be retrieved by clicking on a history icon. Clicking on the history icon shows the history of calls for the particular address: that is it allows access to past records of all calls for the particular address. The computer screen also has a caution icon. Unlike the information under the history icon, which must be "called up", any information entered under the caution icon is automatically displayed on a section of the screen in front of the dispatcher once the associated address is entered. The caution icon is currently used by the CACC to denote physical or environmental hazards, such as the presence of PCBs at a power station or directions on how to enter an industrial site with physical obstructions or hazards.

213. Dispatchers have five or six computer monitors in front of them at their positions. At the dispatch positions with six monitors, three monitors are used for ARIS, to record incoming call information. One monitor displays a map of Essex-Windsor County and shows the location of each ambulance within the County (the AVL screen) and, by scrolling to a different screen, the status of each hospital in the County. One is for the "phone switch". The evidence was unclear as to which of these monitors was missing from the positions with only five monitors, but the final monitor at all dispatch positions is a "Gold Elite" console which is used for dispatch. As I understand the evidence, information with respect to a specific address under the history icon is available to the dispatchers and if information in relation to that address has been recorded under the caution icon, then it will also automatically appear on one of their monitors.

214. By means of a January 6, 2006, memorandum to Windsor CACC staff, Krauter directed that:

> Call takers and dispatchers are to refrain from indicating on the call or broadcast the information "wait for police".
>
> Responding crews are to be provided with all available information of the call, including any potential hazard so that they can assess for themselves scene safety and whether to delay approaching any scene.
>
> (Emphasis is original.)

215. The directive that responding crews be provided with all available information was a pre-existing part of the Windsor CACC's policies. Indicating on the call or broadcasting the information "wait for police" was not part of Windsor CACC's pre-existing policies, but it was part of its practice.

216. The evidence established that the policy to provide crews with "all available information" also needs to be qualified in several respects. The Windsor CACC will not provide paramedics with information available under the history icon with respect to a particular address. Windsor CACC has also declined to "flag" particular addresses, through the use of the history icon, the caution icon or otherwise, at the request of the police or Essex EMS. If, however, in the context of responding to a particular incident the police told Windsor CACC that the ambulance crew should not enter without the police, that information would be passed on. This would have a similar effect to flagging that address, but is dependent on the police having been contacted with respect to the particular incident at the address, and the police having flagged the address in their own system.

217. This of course then raises the question of when the CACC will contact the police in relation to a call. The CACC will contact the police when the call taker has determined that there is a situation of potential danger to the patient and/or paramedics. Prior to February 16, 2006, the LOP listed the following "guidelines" as "indicators" that call takers were to use in assessing the situation for potential danger to the patient and/or EMS crew:

- Patient history of violence and/or aggression;
- Abusive, threatening and/or violent behaviour;
- Patient uncooperativeness;
- Determine if the [sic] is any other individual at the scene or in the vicinity of the call that may pose a hazard at scene;
- Determine if any weapons are involved or present at the scene.

As of February 16, 2006, the LOP was amended to delete the reference to "patient uncooperativeness" from the list. Krauter testified that she made this change because she did not think that uncooperativeness per se was necessarily a good indicator of potential violence.[2]

218. It would seem to follow from Krauter's evidence that the effect of removal of "patient uncooperativeness" from the list of guidelines of potential danger is that police would not be contacted if the patient was simply uncooperative. Krauter testified, however, that she still expected call takers to note and pass on to dispatchers, and dispatchers to advise paramedics, that a patient was being uncooperative, in the sense of, for example, refusing treatment.

219. Duffin testified as to the origins of the MOHLTC's policy of not flagging addresses where there has been a violent patient in the past. He testified that in the mid to latter 1970's what was then known as the ambulance services branch of the MOHLTC would "blacklist" certain addresses, based, for example on a history of repeated, frivolous calls to a residence. Calls from blacklisted addresses might be assigned low priority or not responded to at all. He testified that there was a case in the Barrie area where someone lost their life when an ambulance was not dispatched to a blacklisted address. The branch determined at that time that the practice had to cease.

220. Duffin testified as to the difficulties inherent in ensuring that information with respect to a particular address was current. He expressed concern about "poisoning crews' minds by setting up doubt or concern that is not justified" with respect to responding to a call at a particular address. He also testified as to the practical difficulties a call taker would face in reviewing the history in relation to a particular address while at the same time trying to respond to incoming calls. He noted that particular addresses, e.g. large apartment buildings, may have a history of dozens of calls which would need to be reviewed. He also testified that it would be possible for Essex to install computers in the ambulances which could be used to provide the crews with any address specific information it wished to provide, as has been done by another upper tier municipality with respect to its emergency medical services.

221. In cross examination, Duffin conceded that history of police incidents at a particular address could be entered in the "caution" screen. In my view, this is clearly one option. Notwithstanding his comment about "poisoning crews' minds", he also conceded in cross examination that going to a residence of a notorious motorcycle gang or to a drug den would be a "cause for caution" on the part of an ambulance crew, and that if the address in question continued to be used for this purpose, that would be "good to know" on the part of a responding ambulance crew.

222. The MOHLTC argues that Windsor CACC's refusal to flag a particular residence is sensible because there is no way of knowing whether the individuals at a particular address at the time of a given call are the same as those who were present, and created a risk, at the time of a historical incident. This may be correct, but it appears to be at odds with the overall approach of the CACC that the ambulance crews are best suited to assess the risk in a particular situation, particularly given that, as Krauter conceded, historical information may be relevant to that assessment.

223. I accept that this issue raises a number of difficulties. For example, an address which may have been a motorcycle gang's club house in the past may no longer be a club house at the time of the

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[2] As noted earlier in this decision, the Windsor CACC's LOP with respect to Violent or Potentially Violent Patients, as amended February 16, 2006, has been incorporated into the County of Essex Deployment Plan.

dispatch. There is, thus, a question of the currency of the information with respect to the use made of the address. Even if the use of the address remains the same, the individual or individuals who were potentially dangerous may no longer reside, or at least be present, at the address at the time of the dispatch. In addition, there is a question of the extent to which an individual who is potentially dangerous in one context will be potentially dangerous in the context of a request of emergency medical services for themselves or another individual at the address.

224. The issue, however, is one of risk. There is no dispute on the evidence that going to an address at which a potentially dangerous individual is present elevates the risk to the health and safety of the paramedics. Wilkinson testified that there were only 3 or 4 addresses which Essex sought to have flagged. He testified, however, that the situation was dynamic and that it changes on an irregular basis. One approach would be to assume that each address in the County of Essex-Windsor has an equal likelihood of being risky on the theory that which addresses are risky at a given point in time is the result of some random phenomenon. In my view, however, it is more reasonable to assume that an address which historically has been risky is more likely currently to be risky than an address which historically has not been risky. That is not to say that such an address necessarily poses an actual risk to the health and safety of paramedics, only that the history of an address is relevant information to the assessment of the risk that it may. How useful that information is will of course depend directly on the degree to which an effort is made to ensure that it is current.

225. Given that there are only 3 or 4 addresses at issue, there were times during the hearing when it appeared that the dispute between Essex and the MOHLTC was not so much over whether addresses should be flagged, but rather which of them should be responsible for doing so. The underlying dispute appeared to be about which might bear any liability in the event that paramedics made a decision based on such information to stand by and await police assistance and a patient died as a result. Indeed, in final submissions the MOHLTC and Essex accused each other of being motivated by this concern. Thus, there was evidence and argument directed to: whether Essex could advise the paramedics of flagged addresses by way of word of mouth, postings at ambulance stations, or cards to be distributed to the paramedics and kept in the cabs of the ambulances; whether such techniques were effective and as current as flagging by the MOHLTC dispatchers; and whether postings or cards might give rise to improper dissemination of the information to members of the public who were in the stations or ambulances. To the extent that this evidence and argument appeared to be addressed to an underlying issue of liability as opposed to communication of risk to the paramedics, it was of some concern to me because it ought to have been an irrelevant consideration.

226. These concerns, however, have been assuaged somewhat by the form which CUPE's remedial request on this issue took in final argument, which appeared to be adopted by Essex. CUPE requests that the MOHLTC be ordered to "incorporate into its ambulance dispatch service in Windsor a system of flagging addresses which the Occupational Health and Safety Committee of the County of Essex Emergency Service deems to be potentially hazardous and to ensure that dispatch advises paramedics of the flagged addresses and the details of the flagging when sent to such addresses". That is, CUPE and Essex seek to use the MOHLTC's communications system as a conduit of information for which they would be responsible.

227. The MOHLTC's argument in response to this suggestion is of significance. The MOHLTC argued that it was responsible for ensuring delivery of effective emergency medical services in the province, and that accordingly it would not act as a conduit for information which it

was not reasonably satisfied was necessary to that end. This position speaks to the issues of control and authority addressed earlier in this decision in determining whether or not the MOHLTC has the obligations of an employer (or a supervisor) within the meaning of the OHSA.

228. The MOHLTC argues that the specific request that it be directed to flag addresses deemed potentially hazardous by the Occupational Health and Safety Committee of the County of Essex Emergency Service is ill conceived because the obligation to ensure the health and safety of the paramedics lies with Essex and cannot be delegated. I agree. The OHSA does contemplate that when a workplace requires a joint health and safety committee, the committee may make recommendations to the employer for the improvement of the health and safety of workers (section 9(18)(b)), to which the employer is required to respond in writing. The employer, however, may either respond providing a timetable for implementation (section 9(20)) or respond that it does not accept the recommendation and set out its reasons (section 9(21)). Ultimately the decision is that of the employer, subject to an order by an Inspector or this Board.

229. The evidence before me allows me to reach only three conclusions on this issue. First, that in principle flagging of addresses is a reasonable precaution in the circumstances for the protection of the health and safety of the paramedics. Second, that this is an obligation which both Essex and the MOHLTC share under the OHSA pursuant to section 25(2)(h): Essex as the employer of the paramedics and the MOHLTC as an employer of the paramedics having control of them with respect to this issue in its operation of the communications system. Third, to the extent that the MOHLTC is aware of the existence of a potential danger to the paramedics at an address, as an employer it is also obliged pursuant to section 25(2)(a) of the OHSA to advise the paramedics of this information.

230. When, however, addresses should be flagged is not an issue that I can determine based on the evidence before me, other than to observe that if, as I understand to be the case, the police are themselves flagging a given address there is no apparent sensible reason why this information should not be provided to the paramedics. Accordingly, I direct the MOHLTC and Essex to attempt to reach an agreement on a protocol with respect to flagging, addressing among other things the mechanism by which addresses will be flagged within thirty (30) days of the date of this decision and to advise the Inspector of any agreement reached. In the event that the parties are unable to reach an agreement, they are to advise the Board within sixty (60) days of this decision, failing which this aspect of the application will be deemed to have been resolved. If the parties advise the Board that they have failed to reach an agreement, further directions will be given with respect to an expedited hearing process to determine this issue. I remain seized for this purpose.

The Mike to Mike Function on the Cell Phones

231. CUPE and Essex argue that the MOHLTC has breached its obligations as an employer in relation to the paramedics by failing to allow them to have use of the mike to mike functions on the cell phones. They seek a declaration and an order directing the MOHLTC to unlock the mike to mike capacity on all cell phones used by the paramedics within sixty (60) days of the date of this decision.

232. Whether the mike to mike capacity is enabled or disabled is within the exclusive control of the MOHLTC in its operation of the communications system.

233. I note in passing that there was some suggestion during the adducing of evidence that the MOHLTC considered cell phones to be a substitute for a second portable as a safety device for the paramedics. This position was not, however, advanced by the MOHLTC in final argument. In any event, I am satisfied that a cell phone is not a substitute for a second portable as a safety device: there is no emergency button on a cell phone and oral communication requires retrieving the cell phone from where ever it may be stored and dialling a number rather than simply depressing a button as on the portable.

234. The "mike to mike" function on the cell phones permitted crews of paramedics to speak to each other through their cell phones: the FleetNet communications system is designed only for brief radio transmissions, on average 5 seconds or less, and is not suited to this purpose. The MOHLTC disabled this function, and the dialling capacity on the cell phones. Instead, the cell phones can only be used to call one of approximately 30 pre-programmed numbers. These numbers include the Windsor CACC, the base hospitals, all road supervisors for Essex, ambulance stations and "911". There were two reasons why the MOHLTC disabled the mike to mike function. First, as a result of concerns about abuse: the regular monthly charges for each cell phone were $42/month and the MOHLTC was receiving bills in excess of $200. (It is important to note that Essex was charged by the MOHLTC and agreed to pay for the excess charges.) The second stated reason was that the MOHLTC was concerned to have recordings of communications in relation to a given dispatch. Only calls from the cell phones to the Windsor CACC and the base hospitals are recorded at the Windsor CACC (in the latter instance, as the result of the use of a "diverter box" located at the Windsor CACC): mike to mike communications are not so recorded.

235. CUPE and Essex see the mike to mike function as a mechanism by which paramedics can alert each other to potential dangers at addresses to which they are being dispatched. They argue that it should be enabled until such a time as the paramedics are provided with a second portable and the MOHLTC flags dangerous addresses for the paramedics.

236. The MOHLTC argues that the mike to mike function should not be permitted because of the potential for abuse and the desirability of recording all communications in relation to a particular incident.

237. I accept the argument by CUPE and Essex that enabling the mike to mike function would constitute a precaution for the paramedics in relation to potentially dangerous addresses, as it would permit crews to exchange information with respect to such addresses. The circumstances within which the reasonableness of that precaution must be considered include the current lack of an agreement between Essex and the MOHLTC for flagging those addresses on the one hand and the MOHLTC's concerns about abuse and recording of communications on the other. The MOHLTC's concern about recording communications is undercut by the fact, as CUPE points out, that there are many other communications in relation to a particular incident which are not recorded (for example, communications between the paramedics while in the cab of the ambulance or while at the scene). The issue of potential abuse may be addressed by appropriate discipline.

238. However, the reasonableness of this precaution must also be assessed in light of the orders I have made with respect to the flagging of addresses. An agreement with respect to the flagging of addresses significantly undercuts the rationale for enabling the mike to mike function as a health and safety precaution. Further, the fact that CUPE and Essex sought to have the mike to mike function enabled within sixty (60) days of this decision suggests that it is not possible to enable the mike to

mike function as an interim measure pending the adoption, or imposition, of a protocol on the flagging issue. Accordingly, I decline to make any order with respect to this issue at this time.

In the alternative, has the MOHLTC breached its obligations as a supervisor under the OHSA in relation to the paramedics?

239. For reasons stated above, if I am wrong that the MOHLTC has the obligations of an employer in relation to the paramedics, I conclude that the MOHLTC has the obligations of a supervisor under the OHSA to the paramedics in relation to the communications system it has provided to them and requires them to use, and the manner in which it permits it to be used in communications with the paramedics. In that event, my conclusions with respect to whether the MOHLTC has breached its obligations as a supervisor towards the paramedics with respect to the matters at issue are as follows.

The FleetNet Radio Communications System

240. For the reasons stated with respect to the MOHLTC's obligations as an employer, the problems identified with FleetNet are not properly described as "defects" in the system. Rather they are technological limitations of the system. It is a stretch to describe these limitations as constituting a "potential or actual danger" to the health and safety of the paramedics. Accordingly, I find no breach of section 27(2)(a) of the OHSA by the MOHLTC with respect to this issue. However, ensuring the paramedics understand the technological limitations of the communications system which they are required to use is a reasonable precaution in the circumstances for ensuring their health and safety. Accordingly, I find that the MOHLTC is required to ensure that paramedics understand the technological limitations of the communications system which it requires them to use by providing appropriate training or otherwise in fulfillment of its obligations under section 27(2)(c) of the OHSA.

Preventative Maintenance of the Radios

241. For the reasons stated with respect to the MOHLTC's obligations as an employer, based on the evidence before me, I decline to make an order with respect to the preventative maintenance of the communications system used by the paramedics.

Testing of Emergency Buttons

242. The ability of the paramedics to test the emergency buttons is controlled by the MOHLTC as part of its operational functions. Accordingly, I find that the MOHLTC has the obligations of a supervisor in relation to the testing of the emergency buttons. For the reasons stated with respect to the MOHLTC's obligations as an employer, failure to test the emergency buttons gives rise to an actual or potential danger that the emergency buttons will not work. I find that pursuant to section 27(2)(a), the MOHLTC has an obligation to advise the paramedics of this danger. Failure to have in place a proper protocol for the testing of the emergency buttons constitutes a failure to take every precaution reasonable in the circumstances. I find that pursuant to section 27(2)(c), the MOHLTC has this obligation in relation to the paramedics.

The Second Portable

243. For essentially the reasons stated with respect to the MOHLTC's obligations as an employer, I conclude that in failing to provide sufficient portable radios so that each paramedic in Essex may carry one while on duty the MOHLTC has breached its obligation as a supervisor pursuant to section 27(2)(c) of the OHSA to take every precaution reasonable in the circumstances for the protection of the paramedics.

Flagging of Potentially Dangerous Addresses

244. For essentially the reasons stated with respect to the MOHLTC's obligations as an employer, the evidence before me allows me to reach only three conclusions. First, that in principle flagging of addresses is a reasonable precaution in the circumstances for the protection of the health and safety of the paramedics. Second, that this is an obligation which both Essex and MOHLTC share under the OHSA: Essex pursuant to its obligations as the employer of the paramedics pursuant to section 25(2)(h); MOHLTC pursuant to its obligations as a supervisor of the paramedics pursuant to section 27(2)(c). Third, to the extent that MOHLTC is aware of the existence of a potential danger to the paramedics at an address, as a supervisor of the paramedics it is also obliged pursuant to section 27(2)(a) of the OHSA to advise the paramedics of its existence.

The Mike to Mike Function on the Cell Phones

245. For the reasons stated with respect to the MOHLTC's obligations as an employer, I decline to make an order for the unlocking of the mike to mike function of the cell phones.

Orders

246. In the result, if I am wrong that the MOHLTC has the obligations of an employer in relation to the paramedics, the orders I make against the MOHLTC as a supervisor are *mutatis mutandis* the orders I have made against the MOHLTC as an employer.

Obligations of the MOHLTC as a Supplier of Communications Equipment to the Paramedics

247. The MOHLTC conceded at the outset of the case that it is a supplier within the meaning of the OHSA of communications equipment to the paramedics. While it did not directly advert to the obligations of a supplier in its argument, its position appears to be that it has fulfilled those obligations. CUPE and Essex directed no argument to how these obligations were breached. The Inspector referenced these obligations only for the purposes of arguing that they did not give rise to an obligation on the part of the MOHLTC to implement a preventative maintenance program for the radios.

248. Section 31(1) of the OHSA provides:

> Every person who supplies any machine, device, tool or equipment under any rental, leasing or similar arrangement for use in or about a workplace shall ensure,

> (a) that the machine, device, tool or equipment is in good condition;
> (b) that the machine, device, tool or equipment complies with this Act and the regulations; and
> (c) if it is the person's responsibility under the rental, leasing or similar arrangement to do so, that the machine, device, tool or equipment is maintained in good condition.

249. It is not apparent to me how this section can give rise to any obligations with respect to provision of a second portable, flagging of addresses or the disablement of the mike to mike feature on the cell phones. For reasons stated above, in my view the FleetNet communications system as a whole does not have defects, rather it has technological limitations. There was no evidence that the communications system as a whole was not in "good condition" within those technological limitations.

250. This leaves the issue of testing of the emergency buttons. In my view, a supplier which prohibits the testing of a component of equipment supplied is not ensuring that the component is in good condition. Accordingly, I find that in refusing to permit testing of the emergency buttons on the radios provided to the paramedics the MOHLTC is violating its obligations under section 31 of the OHSA. Any other order I might make with respect to this issue, however, is subsumed by the order I have made directing the MOHLTC as an employer in relation to the paramedics and Essex as the employer of the paramedics to attempt to reach an agreement with respect to an appropriate protocol for such testing.

Summary of Declarations, Orders and Directions

251. For the reasons given, the Board:

(a) Declares that the MOHLTC has the obligations of an employer under the OHSA to the paramedics in relation to their use of the communications system it operates, provides to them and requires them to use in the course of their duties for Essex.

(b) Declares that the MOHLTC has breached its obligations under section 25(1)(b) of the OHSA by refusing to permit the testing of the emergency buttons on the radios used by the paramedics.

(c) Declares that the MOHLTC has breached its obligations under section 25(2)(h) of the OHSA by:

  (i) failing to provide sufficient portable radios so that each paramedic may carry one while on duty;

  (ii) failing to have in place a protocol for the testing of the emergency buttons on the radios used by the paramedics; and

  (iii) refusing to recognize the principle that flagging of addresses is a reasonable precaution in the circumstances for the protection of the paramedics and that this is an obligation which it shares jointly with Essex.

(d) Declares that MOHLTC has an obligation pursuant to sections 25(2)(a) and (h) of the OHSA to ensure the paramedics understand the technological limitations of the MOHLTC communications system which they are using.

(e) Declares that the MOHLTC has breached its obligations under section 25(2)(a) of the OHSA by:

(i) failing to advise the paramedics that failure to test the emergency buttons exposes them to a potential or actual danger; and

(ii) failing to advise the paramedics of any potential dangers of which it is aware at addresses to which paramedics are dispatched.

(f) Declares that the MOHLTC has breached its obligations under section 31 of the OHSA by refusing to permit testing of the emergency buttons on the radios provided to the paramedics.

(g) Orders the MOHLTC, within sixty (60) days of the date of this decision, to provide sufficient portable radios to the paramedics of Essex so that each paramedic may carry one while on duty.

(h) Directs:

(i) The MOHLTC and Essex to attempt to reach an agreement on a protocol for the testing of the emergency buttons on the radios provided to the paramedics by the MOHLTC within thirty (30) days of this decision and to advise the Inspector of any agreement reached. In the event that the parties are unable to reach an agreement, they are to advise the Board within sixty (60) days of this decision, failing which this aspect of the application will be deemed to have been resolved. If the parties advise the Board that they have failed to reach an agreement, further directions may be given with respect to an expedited hearing process to determine this issue. The parties are advised that any such decision may be issued based on evidence and submissions already before the Board. I remain seized for this purpose.

(ii) The MOHLTC and Essex to attempt to reach an agreement on a protocol with respect to flagging, addressing among other things the mechanism by which addresses will be flagged within thirty (30) days of the date of this decision and to advise the Inspector of any agreement reached. In the event that the parties are unable to reach an agreement, they are to advise the Board within sixty (60) days of this decision, failing which this aspect of the application will be deemed to have been resolved. If the parties advise the Board that they have failed to reach an agreement, further directions will be given with respect to an expedited hearing process to determine this issue. I remain seized for this purpose.

Appendix "A"
Relevant Provisions of the OHSA

1. (1) In this Act,

....

"employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

....

"supervisor" means a person who has charge of a workplace or authority over a worker;

....

25. (1) An employer shall ensure that,

....

(b) the equipment, materials and protective devices provided by the employer are maintained in good condition;

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

(a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;

....

(h) take every precaution reasonable in the circumstances for the protection of a worker;

27. (2) Without limiting the duty imposed by subsection (1), a supervisor shall,

(a) advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;

....

(c) take every precaution reasonable in the circumstances for the protection of a worker.

31. (1) Every person who supplies any machine, device, tool or equipment under any rental, leasing or similar arrangement for use in or about a workplace shall ensure,

(a) that the machine, device, tool or equipment is in good condition;

> (b) that the machine, device, tool or equipment complies with this Act and the regulations; and
>
> (c) if it is the person's responsibility under the rental, leasing or similar arrangement to do so, that the machine, device, tool or equipment is maintained in good condition.

2151-08-HS **National Steel Car**, Applicant v. United Steel Workers of America, Local 7135 and John Pierroz, Inspector, Responding Parties

Health and Safety – The employer challenged the propriety of an order requiring it to ensure that workers are protected from falling during the offloading of flatbed trailers – The Inspector issued the order under a section of the Regulation that deals with material handling rather than fall protection – The Board found that the risk identified by the Inspector had nothing to do with *what* the workers were doing, and had everything to do with *where* they were doing it – The elevation of the workers securing the loads on the flatbed trailers (approx 1.5 metres) did not meet the minimum to be captured by the fall protection provisions (3 metres) – The Board held that the Inspector's order imposed a more stringent standard on the Employer than the actual standard in the regulation designed to address the specific hazard – Appeal allowed; order rescinded

BEFORE: *Mary Anne McKellar*, Vice-Chair.

APPEARANCES: *Larry G. Culver, Hal Bruckner, Ed Hastings* and *Terry Dick* appearing for the applicant; *Steve Weller, Bruce Prevost, Robert Reid* and *John Piccolo* appearing for the responding party trade union; *Brian Fukuzawa, Christy Ashton, John Pierroz* and *Scott Manville* appearing for the Ministry of Labour.

DECISION OF THE BOARD: January 27, 2010

Introduction

1. This is an application under section 61 of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O-1, as amended ("the Act") to appeal the Order of Health and Safety Inspector Pierroz ("the Inspector") which was issued following a work-site inspection that occurred on September 25, 2008 ("the Order"). The date set for compliance with the Order was October 31, 2008. The application was filed with the Board on October 15, 2008.

2. By decision of the Board (differently constituted) dated November 7, 2008 (Board File No. 2150-08-HS), the Order was suspended pending the disposition of this appeal.

3. Prior to the issuing of the suspension decision, the applicant employer ("the Employer") also took certain steps to comply with the Order, but the steps taken were not acceptable to the Inspector or to the respondent trade union ("the Steelworkers").

The Facts

4. Except as may be specifically noted, the facts set out below were not in dispute. They are based on the documentary evidence filed and the testimony of Ed Hastings and Robert Reid.

5. The Employer is in the business of manufacturing railroad cars in Hamilton Ontario. Materials (steel in various shapes and sizes) used in that fabrication arrive by flatbed truck to the Employer's steel yard. The trucks are not driven by the Employer's employees.

6. Employees in the bargaining unit represented by the Steelworkers are employed in the steel yard in connection with the unloading of the flatbed trucks.

7. Loads are lifted off of the trucks by crane. The crane is operated by a Steelworker. In order that the loads may be lifted, any fastening devices (strapping) that secure the load to the truck must be removed. This work is normally performed by the driver. A steelworker must then attach a chain sling (or slings) to the load or portions of it so that it may be lifted by the crane. The crane has a particular lifting capacity and this determines the number of portions into which any truckload of material is separated. Wooden blocking material is used to separate the portions of the load. Where such material has been used, it must be removed before the next portion of the load can be lifted.

8. The individual who hooks up the chain sling or who removes any blocking may be the crane operator or may be a helper (also a Steelworker). It may be possible to perform these tasks by remaining on the ground adjacent to the truck, or it may be necessary for the employee to gain access to the flatbed itself to perform them. In the latter case, the practice in the steelyard at the time the Order issued (and for many years previously) was to access the flatbed by means of a portable staircase with platform steps and guardrails on the sides. The employee then dismounts from the flatbed via the portable staircase before any part of the load is lifted. It was estimated that no more than one hour of an eight hour shift would be spent by a worker on the flatbed of a truck.

9. The distance from the ground to the flatbed varies from truck to truck and is dependent on the weight it is carrying. Ed Hastings, the Employer's current Manager of Logistics and a former crane operator testified that the distance from the ground to the top of the flatbed is approximately fifty inches, "give or take eight inches". Hastings also testified with respect to the layout of the steelyard and the area where trucks are offloaded. It is a narrow area and one truck at a time is offloaded in it. Although there is just enough room for a truck to turn around, they are usually unloaded while facing in the direction in which they entered the yard.

10. At the end of April 2008, the Steelworkers representative(s) on the Joint Health and Safety Committee raised some questions respecting the method by which the flatbed trucks were unloaded by its members. This was the genesis of the events that led to the Inspector's attendance at the workplace and the issuing of the Order.

11. The Order was issued under section 45(a) of O. Reg. 851/90. The text of the Order is as follows:

> The employer shall ensure that material, articles or things, required to be lifted, carried or moved, such as the blocking and chain slings used while accessing the top of flat bed trailers in the Steel Yard, are lifted, carried or

> moved in such a way and with such precautions and safeguards, including protective clothing, guards or other precautions as will ensure that the lifting, carrying or moving of the material, articles or things does not endanger the safety of any worker.

12. The Narrative Report accompanying the Order states:

> STATEMENT OF COMPLAINT:
>
> A complaint was made to the Ontario Ministry of Labour. The complaint alleges the following:
>
> The JH&SC has made a recommendation to the employer with respect to fall protection for workers that unload steel in the steelyard when they have to get on the trucks. The employer has responded that the current system is adequate. The committee disagrees and would like the MOL to investigate.
>
> INSPECTORS FINDINGS:
>
> The issue was considered by the Joint Health & Safety Committee. The JHSC recommended that a loading dock be placed in the steel system yard area. The recommendation was considered by the employer as required by subsection 9(20) of the Occupational Health and Safety Act. The response to the JHSC was that workers were instructed to avoid climbing on trailers where possible. Workers are required, in some cases to access the top of flatbed trailers to position chain slings and blocking. While moving and positioning these articles workers are exposed to the hazard of falling. The employer must provide some means of protection to these workers while they are exposes to this hazard.

13. The Employer understood that the concern intended to be addressed by the Order was the risk that a worker might fall from the flatbed.

14. Following the issuing of the Order, the Employer amended its written Procedure for Loading/Unloading Trucks to include the following protocol under the heading, "Working on Trailers":

> **WORKING ON TRAILERS:**
> Anyone on top of a trailer must have a spotter walking along the side of the truck trailer to ensure that the workers is safe. The spotters responsibilities are to ensure that the worker on the truck has stable footing, notice hazards such as loose blocking and or chains on flatbed and adds physical support to the worker incase lose of balance occurs [sic]. The spotter can be the truck driver, fellow worker, lead hand or supervisor.
> NOTE: The worker on the trailer must instruct their spotter on the responsibilities of a spotter and ensure that the spotter understands and can perform the task. If the worker on the truck is not 100% sure that the spotter is competent he must contact his supervisor.

15. All employees in the steelyard signed off on a worksheet indicating that they had received training in the above protocol. Ed Hastings, who has managerial responsibility for the steel yard, but

who does not actually work there, testified that, to his knowledge, there had been 100% compliance with the new protocol. Hastings had revised the protocol to remove reference to "physical support", but the revised version had not yet been implemented due to a labour disruption at the workplace, which disruption was continuing at the time that this hearing concluded.

16. Ed Hastings also testified about other measures that the Employer had considered taking to comply with the Order. Specifically, he said that he had considered and rejected these possible approaches: a loading dock; a portable loading dock; portable barriers; and a fall arrest system. With respect to the last approach, Hastings testified that he had never seen a truck come into the yard with a fall arrest system on it. With respect to the first three approaches, Hastings had concerns that: any kind of dock with barriers would create a risk that a worker might get trapped between a shifting load and the barrier; any dock without barriers would pose the same risk of falling as existed from the flatbed itself; and that because of the potential differential in height between the flatbed and any loading dock, there would be a risk of stumbling and potential "pinch points" might be created in which hands or feet or other body parts might be pinched between the dock and the flatbed. Hastings based his assessment of the viability of each of these approaches on his own years of experience working for the Employer, including in the steel yard, and on discussions he had with some bargaining unit employees. He did not formally consult with the Steelworkers and he did not consult any designers or engineers before rejecting these approaches and deciding that the Order could be complied with and the risk of falling minimized through the use of a "spotter" to call out hazards.

17. There was also some discussion of the use of magnets rather than cranes with slings in the unloading of trucks. Hastings testified that in his view magnets do not provide as safe a means of loading/unloading steel from trucks as do the chain slings and cranes because sheets of steel are often strapped together and when such a load is lifted it is never entirely clear whether the magnet is holding the pieces of the load together (which would be secure) or whether part of the work is being done by the strapping (which could give way).

18. There was some dispute as to whether a worker had ever fallen from a flatbed truck in the steel yard. Hastings testified that he was not aware that any such incident had ever occurred, but the Union in its opening statement had suggested that at least one worker, Robert Reid, had in fact suffered a fall. Mr. Reid testified in this proceeding. Initially his recollection was that he had tripped and fallen off a truck bed and sprained his ankle when he landed on a set of rails or blocking on the ground. He estimated that he had fallen 4 ½ or 5 feet. This incident occurred in 1996. Mr. Reid was shown several documents that were created in 1996 in connection with the reporting of this incident. One completed and signed by him contains the following description of the incident: "Went to step down from truck – stepped on wet piece of wood and twisted r. ankle". The Employer's Report of Injury prepared for the Worker's Compensation Board states the following with respect to this accident: "worker claims he stepped down off of truck onto a wooden block on top of a load causing him to twist his ankle". In addition, internal documents in the Employer's file relating to this matter indicate that after investigation the safety department had made certain recommendations, namely:

> ***THIS IS A LOST TIME ACCIDENT.***
>
> ***THE SAFETY DEPARTMENT RECOMMENDS THAT THIS EMPLOYEE BE INSTRUCTED AS TO THE PROPER PROCEDURE FOR GETTING ON AND OFF OF A TRUCK BY USING THE PLATFORM WITH STAIR OR LADDER.***
> ***THIS INSTRUCTION SHOULD BE PROPERLY DOCUMENTED ON A FORM #120, PROPERLY SIGNED AND FORWARDED TO THE SAFETY DEPARTMENT.***

19. Having reviewed all of the above documents, Mr. Reid acknowledged that they probably provided a more accurate description of how he had come to sprain his ankle than did his initial testimony based on his recollection of an incident that had occurred more than 12 years earlier. Mr. Reid also maintained, however, that the incident in which he was injured would not have occurred if there had been a loading dock in use.

20. I conclude from the above that Mr. Reid did not fall from a flatbed. Rather, he appears to have dismounted directly from the flatbed without using the portable staircase and to have sustained the injury when he slipped from the surface on to which he had dismounted. I do not see how the existence of a loading dock would have prevented this incident, unless it were a loading dock with side rails which would have compelled Mr. Reid to have used the dock's staircase to dismount. It is not apparent to me that such a system would have provided any greater protection to Mr. Reid against the kind of accident he had than is provided by the platform steps that the Employer provides for the workers in the steel yard.

Parties' Positions

21. The Employer's primary position is that the Order is not valid. The concern it purports to address is falling. There is a specific section (section 85) of the Industrial Establishments Regulation that pertains to falling and requires certain protective equipment "where a worker is exposed to the hazard of falling and the surface to which he or she might fall is more than three metres below the position where he or she is situated". The flatbeds of the trucks unloaded by the Steelworkers are lower than two metres in height, so that this section of the Regulation could not be relied on for the making of the Order. Instead, the Inspector made his Order under section 45(a) of the Regulation, which is part of the Material Handling provisions, although no part of the narrative speaks to the practices engaged in by the steel yard worker (chain sling positioning or fastening for example) that specifically pertain to how material on the loads is moved. It is the Employer's argument that, in making an Order under section 45(a) that exceeds the specific requirements imposed by section 85 with respect to falling, the Inspector is essentially promulgating his own regulations. For the same reason, the Employer also submits that section 25(2)(h) of the Act, which imposes on employers the obligation to "take every precaution reasonable in the circumstances for the protection of a worker" cannot justify the Order. Furthermore, the Employer submits that the Order is too vague.

22. The Employer's alternative argument is that, if the Order was validly made, its new protocol complies with it.

23. The Inspector submits that section 45(a) of the Regulation is broad enough to support an Order that aims to eliminate a hazard associated with any part of the process(es) by which material is moved, and that it is not confined to dangers posed by the material itself. Further, the Inspector notes that the Board can make a new order to similar effect as the Order pursuant to the "every reasonable precaution" section of the Act (s.25(2)(h)). Finally, the Inspector submits that the fact that section 85 of the Regulation exists does not mean that measures do not have to be taken to prevent falls from heights of less than three metres, but those measures are not required to entail the use of a fall arrest system. The Inspector takes the position that the Employer's new protocol is not adequate to ensure the safety of workers because it is dependent on the attentiveness and ability to communicate of another worker, and submits that a spotter can never replace a physical protective device. Finally, with respect to the arguments raised about the vagueness of the Order, the Inspector submitted that the Ministry's responsibility is identifying a hazard and it does not bear the onus of finding an

adequate solution to the elimination/amelioration of that hazard. That responsibility, it asserts, rests with the Employer, who did not meet it when it failed to consult professionals such as designers and engineers to assist in the assessment of the various options Ed Hastings identified.

Analysis

24. The Board in this case issued a decision suspending the Order. Appeals of Orders that have been suspended rarely proceed to a hearing on the merits. Although the parties before me made some submissions on the weight, or persuasive value, if any, to be given to the reasons for the suspension in this case, the case law, not surprisingly, offers no guidance on the issue. I do not think it is necessary or useful to articulate any general proposition about the relationship between the reasons provided for a suspension decision and outcome of the appeal on the merits. In this appeal, however, I do find some of the observations and analysis in the suspension decision to be compelling, so it is perhaps appropriate to set out briefly why I reject the Ministry's position that I should have no regard whatsoever to the suspension decision.

25. The suspension decision contains a number of observations respecting the usual criteria considered by the Board when confronted with a suspension request. Among the considerations are the possibility a worker might be endangered if the order is suspended, and whether there is a *prima facie* case on the merits of the appeal of the order. In suspending this particular Order, the Board concluded both that doing so would not endanger any worker, and that the Employer had a good case on the merits of the appeal. As it turned out, the conclusion about the potential for endangerment to worker safety should the Order be suspended was in large part predicated on what all the parties before me agreed was a misapprehension of fact, namely that there was a fall arrest system available on each of the flatbed trailers. It was for this reason as I understand it that the Ministry submitted that no regard whatsoever should be given to the suspension decision. For its part, the Employer pointed out that the misapprehension of fact that occurred in this suspension decision went exclusively to the question of potential worker endangerment, and did not form any part of the basis for the panel's observations about the legal merits of the case. The Employer urged me therefore to have regard to those observations. It appears to me that it is not inappropriate to do so in the context of this case, and in any event the observations reflect what is in my view established jurisprudence.

26. This is what the suspension decision had to say about the legal merits of the case. I note that there are repeated references to section 25(1)(h) of the Industrial Regulation, which does not exist. The correct reference is obviously section 25(2)(h).

> 26. While I accept it is not up to the Inspector to provide advice to an employer on compliance it seems to me an inspector's order ought to be clear as to what is required in order to achieve compliance with the order. In this case, the Inspector directed the employer to "provide *some* means of protection to these workers while they are exposed to this hazard." [emphasis added] …
>
> 27. Finally, I am persuaded the applicant's legal argument with respect to the inapplicability of the material handling regulation to the hazard of falling from flatbed trailers has considerable merit. The Inspector relied on a provision in the Industrial Establishments Regulation that addresses the manner in which workers are to handle, carry, move and store materials and equipment. There is another section of that Regulation relating specifically

> to fall hazards. The Inspector in his submissions contends section 25(1)(h) of the Act also provided the authority to make the Order. The Inspector also suggests that if the Order is suspended, another order could be issued based on section 25(1)(h).
>
> 28. While section 25(1)(h) of the Act requires an employer to take every precaution reasonable in the circumstances for the protection of a worker, it seems to me where a regulation under the Act deals with a specific hazard, such as the hazard of falling addressed by section 85 in the Industrial Establishment Regulation, compliance with that section of the Regulation might well be construed as complying with section 25(1)(h) if the precaution in issue relates to a fall hazard.
>
> 29. In any event, whether the Inspector issues another order if the Order under appeal is suspended is not material to the disposition of this application. If another order is issued relying specifically on section 25(1)(h) of the Act to address the fall hazard on flatbed trailers being unloaded at the applicant's premises, the applicant can respond in the way it sees fit.

27. The above comments appear to me to reflect some propositions that are well established in the Board's case law under the Act:

> 1. an order may be so vague as to be unenforceable (*Tembec Industries Inc. (Timmins Sawmill)*, [2005] OLRB Rep. September/October 863) (October 11, 2005);
>
> 2. an order must provide a party with some guidance as to the nature of the problem to be fixed and how to fix it (*Barrie Welding & Machine (1974) Ltd.*, [2008] O.O.H.S.A.D. No. 68) (September 5, 2008); and
>
> 3. it is not appropriate for an Inspector to usurp the regulation-making power through the guise of making an order (*General Motors of Canada Ltd. (Re)*, [1991] O.O.H.S.A.D. No. 11) (October 1, 1991).

28. This is an appeal under section 61 of the Act. The Board's powers on appeal are set out in section 61(4), and include the power to rescind the Inspector's Order and/or to make a new order.

29. The Order is made under the Material Handling provisions of the Regulation are found in sections 45 through 66. Of these sections, section 45 employs the most general language. Section 45(a) provides:

> **45.** Material, articles or things,
>
> (a) required to be lifted, carried or moved, shall be lifted, carried or moved in such a way and with such precautions and safeguards, including protective clothing, guards or other precautions as will ensure that the lifting, carrying or moving of the material, articles or things does not endanger the safety of any worker.

30. Section 45(a) requires the elimination/minimization of endangerment to the safety of a worker occasioned by the "lifting, carrying or moving" of material. The balance of the sections dealing with Material Handling similarly focus on protecting workers from dangers occasioned by the way materials are transported or the way that stored materials are stabilized against unplanned movement.

31. Without having regard to the narrative that accompanies it, the Order appears to take issue with the manner in which the chain slings and blocking are lifted or moved. There is however no evidence nor was there any suggestion that unstable or moving slings or blocking posed any risk to a worker, and indeed the risk identified by the Inspector as indicated in the narrative had nothing to do with *what* the workers were doing, and had everything to do with *where* they were doing it – a flatbed trailer approximately 1.5 metres above the ground from which he concluded there was a risk of falling.

32. Unlike section 45(a), section 85 of the Regulation explicitly addresses concerns about *where* work is performed, and deals specifically with precautions that must be taken to protect workers who perform work elevated off the ground from the risk of falling. The height from which one of the Employer's workers might fall (1.5 metres) while working on a flatbed trailer is not of sufficient magnitude (3 metres) to engage the requirements of section 85 of the Regulation.

33. Whether an employer has done all it must do to protect workers against the hazard of falling is normally to be assessed having regard to the industrial safety standard specifically promulgated to address the hazard of falling – section 85 of the Industrial Establishments regulation. This Order imposes on the Employer a more stringent standard than that imposed by the provisions of the Industrial Regulation designed to address this specific hazard. It cannot be valid to impose a standard more exact than that provided in section 85 simply by issuing an order. The situation here is identical conceptually to that addressed in the *General Motors* case, *supra* where the adjudicator found that an order made under the "every reasonable precaution" section of the Act could not stand were it imposed a more stringent standards than that prescribed by the regulation specifically dealing with the hazard in question:

> 15. …I cannot overlook the fact that the Regulations do not require interlocking mechanism to ensure that the guards in question remain in place. It is not my role, or the role of the Inspector, to rewrite the Regulations. This is not to say, of course, that the Regulations provide an exhaustive code of what will constitute reasonable precautions for the safety of workers in all circumstances. However, where the Regulations clearly address a specific subject matter (such as, in the case at hand, conveyors) unless there is something distinctive about a particular workplace setting which renders the applicable regulation manifestly inadequate to deal with those unique circumstances, it would be contrary to the principles of the Act to use subsection [25(2)(h)] to amend the Regulations. The Act clearly contemplates the use of the regulation-making power to deal with specific situations, and those regulations have the force of law.

34. I conclude that the Order was not validly made under section 45 of the Industrial Regulation and it is therefore rescinded. I further decline to exercise my power under section 61(4) to issue an order to the same effect pursuant to section 25(2)(h) of the Act, and rely on the reasoning in the extract from *General Motors, supra*.

35. Had I not determined that the Order exceeds the bounds of what can be ordered under section 45 of the Industrial Regulation or indeed section 25(2)(h) of the Act, I would have found that the Employer's implementation of the spotter system complied with the Order.

Disposition

36. For all of the above reasons, the appeal is allowed and the Order is rescinded.

2962-09-M; 2963-09-U Labourers International Union of North America, Ontario Provincial District Council, Applicant v. **Percon Construction Inc.**, Responding Party v. Construction Workers Local 52 affiliated with the Christian Labour Association of Canada, Intervenor; Labourers International Union of North America, Ontario Provincial District Council, Applicant v. Percon Construction Inc. and Construction Workers Local 52 affiliated with the Christian Labour Association of Canada, Responding Parties

Construction Industry – Interim Relief – Intervenor – Unfair Labour Practice – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

BEFORE: *John D. Lewis*, Vice-Chair.

APPEARANCES: *Benjamin A. Barnes, Anne Cumming, Glen Chochla, Carlo DiBlasio, Carlo Ricci, Gerry Varrichio, Saverio Repole, William Mercer, Jason Vehrs, Doug Ruddy, Alfranca Lee, Ibrahim Arslan, James McKnight, Matt Downey, Chad Summers, Aiuna Elebo* and *Paul Cory* appeared for the applicant; *Peter Israel, Carita Pereira, Frank Perricone* and *Rieny Van Loon* appeared for the responding party; *Elizabeth J. Forster, Maria Kotsopoulos* and *Stephen Bromell* appeared for the intervenor.

DECISION OF THE BOARD: February 1, 2010

1. This is an application for interim relief pursuant to section 98 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The application for interim relief and an unfair labour practice complaint (the pending ULP application in Board File No. 2963-09-U) were filed by the applicant union, the Labourers International Union of North America, Ontario Provincial District Council (the "Labourers"), with the Board on January 5, 2010.

2. The Labourers sought as interim relief the reinstatement to employment of the following six (6) construction labourers: William Mercer ("Mercer"), Matthew Downey ("Downey"), Arslan Ibrahim ("Ibrahim"), Alfranca Lee ("Lee"), James McKnight ("McKnight") and Chad Summers ("Summers"). The Union initially sought various other remedies by way of interim relief.

3. The responding party, Percon Construction Inc. ("Percon" or the "Employer") resists the interim application. It asserts the above six (6) individuals were all laid off from employment for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between the Employer and Construction Workers Local 52, affiliated with the Christian Labour Association of Canada ("Local 52" or the "Intervenor").

4. Local 52 filed an intervention in the interim relief application and a response in the pending ULP application, wherein it is named as a responding party. No one objected to Local 52 intervening in the interim application. The intervenor is presently the bargaining agent for the employees of Percon and it has a collective agreement with Percon, effective April 2007 to March 31, 2010. In this regard, declarations have been filed by the Labourers alleging certain conduct by the Ontario Representative of Local 52.

5. The intervenor takes no position on whether the circumstances in this matter establish the conditions necessary for the granting of interim relief. Rather, Local 52 indicates it has intervened in order to correct what it describes are inaccuracies in some of the declarations filed by the Labourers.

6. One may have already surmised from the above introductory paragraphs that the present interim relief application deals with an alleged union organizing campaign by the Labourers, on the eve of what is commonly referred to as the "open period". Section 7(4) of the Act states that "[w]here a collective agreement is for a term not more than three (3) years, a trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last three months of its operation". A timely application for certification filed with the Board during the "open period" is commonly referred to as a displacement application.

7. Usually a timely displacement application will result in a representation vote taking place between the union that seeks certification and the incumbent union. In the construction industry, the Board's long-standing approach to voter eligibility in such representation votes is to limit eligible voters to those employees at work in the bargaining unit on the date of the displacement application

8. At the time of writing this decision, the open period pertaining to the collective agreement between Percon and Local 52 has begun and will remain open to March 31, 2010. As of yet, the Labourers have not filed a displacement application. The Labourers take the position that Percon's actions, in laying off the six (6) individuals, has resulted in a substantial chilling effect on its ongoing campaign.

9. The Board held a Consultation on January 22, 2010. The parties appeared with all or some of those persons who have filed declarations in this matter. Pursuant to the Board's Rules of Procedure, the Labourers filed sixteen (16) declarations and supplementary declarations, including declarations from each of the six (6) individuals whose reinstatement is being sought. The Employer also filed sixteen (16) declarations and supplementary declarations. The intervenor filed one declaration and one supplementary declaration. In this regard, the Board allowed the filing of all declarations and granted leave to amend the pleadings in both of these applications (also see the Board's decision, differently constituted, in this matter dated January 8, 2010).

10. At the outset of the Consultation, the Board indicated to the parties that the purpose of the Consultation was to elicit further information to assist the Board in answering the threshold questions outlined in section 98 of the Act. I indicated the Consultation was not for the purpose of making findings of fact whether or not an unfair labour practice has been committed. That function is left to the panel of the Board that will be assigned to the pending ULP proceeding.

11. The Board also indicated that, based on the declarations and submissions filed, it did not need to hear from the parties on the issues identified in section 98(2), paragraphs 1 and 2 of the Act. The employer in its materials conceded there was a serious issue to be decided in the pending proceeding. However, the employer did not concede that the circumstances giving rise to the pending ULP proceeding occurred at a time when a campaign to establish bargaining rights was underway. Even though the employer did not concede this point, the Board indicated to the parties that it was satisfied that a campaign to establish bargaining rights was underway. As a result, the Board wanted to hear from the parties on the issues that arise out of section 98(2), paragraphs 3 and 4 and section 98(3) of the Act.

12. The Board indicated it desired clarification in a few areas and felt the most expeditious way of obtaining such clarification was for the Board to direct its questions to counsel for each of the parties and have them get the answers from their clients. The Board, given the significant number of declarations filed, did not see the need to question any of the declarants. Following receipt of the information requested by the Board, counsel for the parties were permitted to ask, if they wished to do so, any follow up questions pertaining to the Board's questions.

13. At paragraph 42 of *Metrican Stamping Co. Inc.*, 2005 CanLII 43485 (ONLRB) (November 23, 2005), the Board described the Consultation process as follows:

> A Consultation is not a traditional Hearing. It is a very flexible procedure that allows the Board to be proactive in exploring the allegations so as to decide the matter expeditiously. Where possible, the goal is to conduct the Consultation in one day. The declarants are not usually required to give testimony under oath and the parties are not normally allowed to engage in questioning or cross-examination of the declarants. The Consultation will not necessarily be used to resolve all disputes regarding all of the facts or to determine the credibility of the declarants. Rather, in absence of resolving all of the factual disputes or determining the credibility of the declarants, the Board may still be able to conclude that it has sufficient information to render a ruling on the section 98 Application.

14. In the materials filed with the Board the employer admits it made an inadvertent mistake when it laid off Lee as the layoff was not done in accordance with the provisions of the collective

agreement. By the time the Consultation was heard the employer had reinstated Lee to his former position. At the Consultation the employer also indicated that Mr. Jason Vehrs ("Vehrs") was in the process of being returned to a particular job site. The Labourers had alleged Vehrs had been the subject of a reprisal for exercising rights under the Act, in that, he had been transferred to a job site furthest from his home due to his support and role in the Labourers' organizing campaign. The Employer disputes these reprisal allegations.

15. As a result of these developments, the Labourers indicated to the Board that, without prejudice to its pending ULP application, it was content for the purposes of the interim application, to only seek the remedial relief of reinstatement and the issuance of the standard Board "Notice to Employees" which the Board has ordered in other cases in which interim relief has been granted.

16. Therefore, the remaining questions for determination are:

> i) Whether the interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives?
>
> ii) Whether or not the balance of harm favours the granting of the interim relief pending the outcome in the unfair labour practice complaint?
>
> iii) Whether or not it appears that the lay offs of the individuals were unrelated to the exercise of their rights under the Act?

17. Before answering these questions outlined above, I propose to set out briefly the factual underpinnings in this matter.

Undisputed Information Provided by the Parties

18. Percon is an employer engaged in the construction industry. At the time of the disputed layoffs, the Employer had construction labourers employed at the following job sites in Board Area 8:

> i) the Glenn Gould School Project at Major Mackenzie and Weston Road (5 Construction Labourers); Site Superintendent: Randy Adams ("Adams"); occupancy: August 2010;
>
> ii) the Block 18 Elementary School Project on Peter Rupert Dr. (5 Construction Labourers + 2 other Construction Labourers employed by a Company named Rockwell, in which Percon has an interest); Site Superintendent: Larry Hewgill ("Hewgill"); occupancy: November 2010;
>
> iii) St. Michael's Secondary School in Bolton (5 Construction Labourers); Site Superintendent: Craig Carr ("Carr"); occupancy: August 2010;
>
> iv) Markham Secondary School (4 Construction Labourers); Site Superintendent: Mike Van Loon ("Mike"); occupancy: August 2010;
>
> v) Peel Manor (1 Construction Labourer); Site Superintendent: Colin Mucci ("Mucci"); occupancy: January 2010;

vi) Georgetown Secondary School (2 Construction Labourers); Site Superintendent: Craig Mucci; occupancy: October 2010.

19. Frank Perricone ("Perricone") is the owner and President of Percon. Rieny Van Loon ("Rieny") is the General Superintendent for Percon and was the individual who hired all six (6) of the laid off employees who are the subject matter of this interim relief application.

20. The Employer's initial layoff involved seven (7) employees. The seventh employee was Desmond Bannis ("Bannis") who was hired December 16, 2009; and laid off December 23, 2009. He worked at the St. Mike's Secondary School site in Bolton. All seven (7) employees were employed by Percon as construction labourers.

21. Percon has a collective agreement with Local 52 which expires March 31, 2010. The Ontario Representative for Local 52, who is responsible for the Percon bargaining unit, is Stephen Bromell ("Bromell"). One of the Local 52 union stewards, who is also a construction labourer for Percon, is Doug Ruddy ("Ruddy").

22. At the beginning of December 2009, the Employer placed a hiring ad in the Vaughan paper for experienced construction labourers to work on projects in the Maple area. In addition, and perhaps against the instruction of the employer, the ad also appeared on the York Region website.

23. The undisputed employment details concerning the seven (7) employees, just prior to their lay offs, are as follows:

i) Mercer: started work August 17, 2009 – laid off December 22, 2009. Working at Block 18 site at time of layoff; Mercer often worked with Lee and had worked previously at the Glenn Gould site.

ii) Downey: hired in or around December 15/16, 2009; started work at Block 18 site on December 21, 2009; laid off in the evening of December 21, 2009. During his shift on December 21, 2009 he had agreed with the Site Superintendent to work late on December 24, 2009.

iii) Ibrahim: saw job ad and hired December 15, 2009 to start work December 16, 2009 – laid off December 23, 2009. Worked at Glenn Gould Site. Off work on December 21 and 22, 2009.

iv) Lee: hired July 24, 2009 – laid off December 22, 2009. Worked at Glenn Gould Site. Brought back to work January 11, 2010.

v) McKnight: saw job ad and hired December 15, 2009 to start work December 16, 2009 – laid off December 22, 2009. Worked at Glenn Gould Site.

vi) Summers: referral from CLAC, hired December 14, 2009 to start work December 16, 2009 – laid off December 23, 2009. Worked at Glenn Gould Site.

vii) Bannis: stated work December 16, 2009 – laid off December 23, 2009. Worked at St. Mike's Secondary School site.

24. Local 52 has a collective agreement with Percon that expires on March 31, 2010. The following articles of the collective agreement are of note:

> 13.04 When the employer deems it necessary to reduce the workforce he shall consult with the union on the need for layoffs. Where a reduction in the workforce is inevitable, probationary employees shall be laid off first. …
>
> …
>
> 13.06 The Employer shall give four (4) hours notice of the need for a layoff. In so far as possible layoff shall take place on Fridays and recalls shall take place on Mondays for EI purposes.
>
> …
>
> 3.02 The Employer may subcontract out work where:
>
> a) he does not possess the necessary facilities or equipment
> b) he does not have and/or cannot acquire the required manpower.
>
> Work normally performed by members of the bargaining unit will not be subcontracted out if employees qualified to do the work are on layoff, or if employees qualified to do the work must be laid off, transferred, demoted or discharged as the result of the subcontracting out of work.

25. Pursuant to the terms of the collective agreement, employees obtain company-wide seniority upon the completion of four (4) months of employment in a two (2) year period. Under the collective agreement probationary employees are not able to grieve their dismissal.

26. It is not disputed that prior to the layoffs the Employer was notified that a major project, in which it was the low bidder (i.e. the Milton #1 Secondary School project), was not going ahead and would be put back out to tender in 2010. The date on which the Employer was advised as to the cancellation of the Milton #1 project is in dispute (the Employer indicates this occurred on December 18th, the Labourers believe it occurred December 7, 2009). Whether the new hires were hired anticipating that they would eventually work on the Milton #1 project is not agreed to. However, it is not disputed that under the terms of the Milton #1 bid, the Halton Board had 60 days in which to accept Percon's bid (i.e. until December 8, 2009) and that Percon had been working with the Halton Board since the close of the bid (ie. October 8, 2009) to try and realize the cost savings necessary in order to meet the Halton Board's budget allocation for this project.

27. It is not disputed that Percon contracted out the weather proofing/winter protection work that some of the construction labourers of Percon had been performing at the Glenn Gould site to the masonry contractor at that site. The *bona fides* of the contracting out and the details surrounding the contracting out are in dispute. It is significant to note that no declarations from the masonry contractors were filed by the Employer in this application. As a result, much of the details surrounding the contracting out do not comply with Rule 19.2 of the Board's Rules of Procedure that requires first hand knowledge and not hearsay.

28. On Friday, December 18, 2009, Bromell, the Ontario Representative for Local 52, with the permission of the Employer visited the Glenn Gould job site. Bromell met with the union steward, Ruddy, as well as Lee, McKnight and Ibrahim. Bromell distributed membership cards to the new hires and asked them to join Local 52. All of the new hires refused to sign the membership cards, at that time, and indicated they needed to think about it.

29. After that meeting Bromell met with just Ruddy. Bromell asked Ruddy why he had not advised him that new employees had been hired and reminded him that it was his job, as union steward, to advise him of new hires. Bromell asked Ruddy if the Labourers had been visiting the job sites and Ruddy indicated with words to the effect "of course, it is open season". There is no dispute that after Bromell's visit to the Glenn Gould site, Local 52 had knowledge the Labourers were interested in organizing Percon.

30. After the meeting between Ruddy and Bromell, Ruddy went and told Lee, McKnight and Ibrahim that Bromell had told him that if the employees went with LIUNA, Local 506 they would find themselves without employment and the employer "would get rid of us". Bromell vehemently denies that he told Ruddy anything to that effect.

31. On December 18, 2009, Rieny, the General Superintendent, also visited the Glenn Gould site. The motive for attending and much of the details concerning conversations on the site that day are disputed. For example, Rieny declares he attended at the Glenn Gould site due to complaints from the masonry contractor that the weather protection work was proceeding too slowly. Therefore, Rieny went out to the site to personally assess the complaints. This is disputed by the Labourers. In any event, on December 18, 2009, McKnight and Lee declare they heard the site superintendent Adams on the telephone say, "I will keep an eye on him" and then the declarants say Adams became more vigilant in observing them. Adams declares that he did not become more vigilant and the reference to the phrase "I will keep an eye on him" pertains to a phone call he had with Perricone. Adams declares that Perricone phoned him that day and told him to "keep an eye" on the masonry contractor so Perricone could properly assess the complaints of the masonry contractor.

32. On December 18, 2009, McKnight declares that he overheard Adams say to Rieny that "he was going to keep an eye out for activity on the site". This statement is not disputed in either of Rieny's or Adam's declarations.

33. While the facts in this paragraph are disputed, the Board includes them here for purpose of chronology. Perricone declares that on the morning of December 21, 2009 he received a quote from the masonry contractor for the winter protection work at Glenn Gould. Perricone also declares that on the morning of December 21, 2009 he asked his Office Manager to give him a list of the seven (7) least senior construction labourers and that by the afternoon Perricone had decided to proceed with layoffs.

34. On December 21 or 22, 2009 Carr, the Site Superintendent at the St. Michael's site was contacted by another employee, Steve Jadilebovski ("Jadilebovski") complaining that he and his father had been visited at home by union organizers from Labourers Local 506. In his declaration Carr declares that he did not tell Perricone or Rieny of this until January 4, 2010.

35. In response to one of the Board's questions asked at the Consultation, Perricone indicated that on the morning of December 22, 2009, he was advised by the mechanical contractor at the Glenn

Gould site, that some of the mechanical contractor's employees had observed the day prior "that there had been a guy parked all day in a white pickup truck at the site and that some guys from Local 506 had been observed walking around the site". This information was not in any of Perricone's declarations or supplementary declarations.

36. On the morning of December 22, 2009 both Perricone and Rieny visited the Glenn Gould site. While many of the details of conversations that took place that morning are in dispute, it is not disputed that Local 506 came up in a conversation between Ruddy and Perricone.

37. The vast majority of the layoffs took place at the end of the work day on December 22, 2009 or the beginning of work on December 23, 2009. At the time of the layoffs no indication was provided as to whether the layoffs were temporary or permanent.

38. Subsequent to the layoffs taking place, Vehrs, one of the Labourers' key inside organizers, had a conversation with Perricone in which Vehrs' role in the Labourers campaign was discussed. Unbeknownst to Perricone this conversation was taped. Subsequent to this conversation, Vehrs was notified that he was being transferred off his current job site and reassigned to a job site that was the farthest from his home regarding travel time. The *bona fides* and details surrounding the transfer are disputed. At the Consultation the Employer indicated Vehrs was being returned to his original job site.

39. Subsequent to the layoffs, certain individuals continued to make inquiries of management representatives of the Employer concerning hiring opportunities. Unbeknownst to the Employer some of these conversations were taped. In particular, a January 4, 2010 conversation between Hewgill, Site Superintendent at the Block 18 and Aiuna "Patrick" Elebo ("Patrick"). In the Labourers' declarations details of the taped conversations were particularized and disputed by the Employer declarants. Subsequent declarations were filed by the Labourers which contained the actual audio recordings and transcripts (it should be noted that these conversations take place before the Employer was served that day with the applicant's interim relief application). The Employer did not file any supplementary declarations disputing the audio recordings or the transcripts. Therefore, it appears that the following excerpts from the taped conversations are no longer in dispute:

a) Hewgill and Patrick (at Block 18, January 4, 2010)

> **In response to a question about whether Hewgill had heard about the firing of "those guys" he states:**
>
> Hewgill: "Yeah, because we can't have anybody who is in 506 or 183, no union guys"
>
> **While on the telephone with Rieny, Hewgill inquired about Patrick speaking with Rieny earlier about job opportunities and the following exchange took place:**
>
> Hewgill: "Patrick said he spoke to you a few weeks ago looking for a job. No. Oh, okay. Alright. Thanks Rieny. Bye. No, says no we're not hiring. He says too much bullshit right now with the union and he says they're not hiring anybody."
>
> Patrick: "Bullshit who?"

> Hewgill: "With the union because right now we're going though possibly the Labourers possibly signing for go union, some of them don't want to, some of them do so he says we're not hiring anybody."
>
> **In another exchange Patrick continues to ask for a job and Hewgill responds:**
>
> Hewgill: "Yeah. No. I know but he just said, you probably heard, he said no we're not hiring anybody until this shit's straightened out, which is going to be nothing until April before we know if they're union or if they're signing with the CLAC again.
>
> **The following exchange later took place:**
>
> Hewgill: "No they don't even want to, they don't want to hire anybody outside because they don't know if you're affiliated with a union, not affiliated, whether you would sign for the union, so right now he wants to stay with who he has, not rock the boat, wait three months.
>
> Patrick: "Oh _______ affiliated?"
>
> Hegwill: Affiliated means maybe you were with a union before, maybe you are with a union telling us you're not with a union coming in and you're going to sign a guy, so he doesn't want to hire anybody because he doesn't believe…

40. As it concerns the conversation between Vehrs and Perricone it cannot be disputed that Perricone knew about Vehrs' involvement with the Labourers and his participation in home visits. Perricone suggested to Vehrs that he should quit his employment with Percon and repeatedly suggested Vehrs should go work for Local 506.

The Labourers' Version of Events

41. The Labourers' version of events commences with an ongoing campaign that started in November and December of 2009, which was meeting with success. It had recruited inside organizers and had supporters. The campaign's objective was to have culminated in a displacement application being filed, some time during the open period, which ends March 31, 2010.

42. According to the Labourers, there was plenty of work for construction labourers on the various job sites and the Employer was hiring. It also asserts the Employer and its management representatives made various statements about the volume and longevity of the work, such statements being disputed by the Employer.

43. After the visit by the Ontario Representative for Local 52, the organizing campaign was known to the incumbent union. Further, due to complaints from home visits that the Labourers organizers were conducting, it believes the Employer had become aware of the Labourers campaign prior to the layoffs taking place.

44. The Labourers assert that the activities of its inside organizers as well as its supporters were known to other employees of Percon.

45. The Labourers' version disputes the *bona fides* of the contracting out of the winter protection at the Glenn Gould site to the masonry contractor. The contracting out as well as the cancellation of the Milton #1 project are viewed as convenient excuses used by the Employer to rid itself of the new hires and others that it either knew or suspected were supporters of the Labourers. The Labourers assert the layoffs were contrary to the Company's normal practice, which is not to layoff seasonally or otherwise.

46. In its submissions, the Labourers state that the lay offs which occurred had anti-union motives, in the sense that the Employer was anti-union as against the Labourers. In support of this assertion, the Labourers point to statements made by management representatives in the taped audio recordings and assert the statements are reflective of the Employer's motives at the time of layoff. The Labourers assert that the Employer's actions have had a chilling effect upon its ongoing campaign and have undermined its ability to obtain the confidence of the employees. It submits that unless the six (6) (now five (5)), individuals are immediately reinstated, its support will be eroded and its efforts to be certified may be frustrated given that it continues to have an ever shrinking window of opportunity to become the bargaining agent due to the operation of the open period.

47. The Labourers submit all of the criteria of subsection 98(2) of the Act have been met and it does not appear that the layoffs were unrelated to the Labourer's ongoing campaign. Accordingly, the Labourers request the Board immediately order the reinstatement of the laid off individuals.

The Employer's Version of Events

48. Percon's version starts with the assertion that the owner of Percon was not aware, prior to the interim relief application, that any of Mercer, Ibrahim, McKnight, Downey, Summers or Lee were supporters of the Labourers. The Employer was not aware that any of these individuals were involved in an organizing campaign for the Labourers or were in any way affiliated with the Labourers prior to them being laid off. In fact, in its pleadings, the Employer indicated it had no knowledge that a campaign to establish bargaining rights was underway at all material times relevant to the application.

49. Percon indicates that McKnight, Ibrahim and Summers were all hired in December 2009 to do winter protection at the Glenn Gould site and on the basis that Percon would need them for a large upcoming project, the Milton #1 school project.

50. The day after the crew of construction labourers started to do the winter protection work at the Glenn Gould site (ie. December 17, 2009), the masonry contractor complained to Perricone that work was going too slowly. Rieny was sent to the site the next day, December 18, 2009, and he determined work was slow and it would be very expensive to complete at this pace.

51. On December 18, 2009, Perricone officially found out that the Milton #1 job had been shelved. Further, on this date Perricone started to pursue the issue of contracting out the winter protection work at the Glenn Gould site with the masonry contractor, as the contractor was now threatening to remove his masons from the site.

52. On December 21, 2009, Perricone received a quote from the masonry contractor that was $11,000 less than the cost if Percon continued to do the work with its own construction labourers. As

a result, Perricone assessed his manpower requirements going forward. Based on these recent developments and the assertion that the volume of projects was slowing down, Perricone determined he needed to layoff the seven most junior employees. Perricone asked his Office Manager, Louisa Solimine ("Solimine") to provide him with a list of the seven (7) employees with the least seniority. The list inadvertently had the name of Lee on it, when in fact another individual named Chris Watters ("Watters") should have been on the list instead of Lee.

53. The Employer denies that in any of the hiring conversations it may have had with the various employees did it promise longevity of employment or that there would be no layoffs. The Employer says in 2008 and 2009 various layoffs took place. Further, it is the Employer's position that now there is no work available for the laid off individuals at any of the sites. Percon has not hired anyone new since the layoffs.

54. In its submissions, the Employer indicated that the layoffs occurred for *bona fide* business reasons and have nothing to do with the Labourers organizing campaign. Likewise, the selection of those who were laid off had nothing to do with who supported a campaign but rather was just the application of seniority. The terms of the collective agreement obligated that probationary employees and junior employees be the first to be laid off.

55. Percon denies it has engaged in any conduct whatsoever designed to coerce or intimidate its employees for the purpose of interfering with employees' rights or for the purpose of interfering with the formation and selection of a trade union.

56. The Employer submits that the Labourers are planting supporters to attend at job sites, subsequent to the layoffs to bait management representatives into making statements that are not reflective of the motives or conduct of the Employer at the time of the layoffs and that such statements should be disregarded by the Board.

57. The Employer submits that, in light of the undisputed facts and the credible denials asserted, there is no causal relationship between the layoff of the employees and their exercise of rights under the Act. In addition, Percon asserts the Labourers have not met its burden to establish irreparable harm, as key inside organizers remain at work and the balance of harm favours the Employer. Reinstatement would cause the Employer significant financial loss.

Decision

58. The Board finds that all of the requirements of section 98(2) and (3) of the Act have been met and the Board orders Percon to recall/reinstate Mercer, Downey, Ibrahim, McKnight, Summers and Lee for the following reasons. The Board notes that Lee has already been returned to the workplace, however, the Board views Lee as being in the same position as the other laid off individuals, who are the subject of this interim application.

i) s. 98(2) para. 2: Is there a Serious Issue to be Decided?

59. The ULP Complaint alleges that the six (6) individuals were laid off because they supported the organizing campaign. Consistent with all of the recent section 98 jurisprudence, the Board finds such allegations amount to a serious issue to be decided. As stated earlier in this decision, the employer conceded this point.

ii) 98(2) para. 1: Was a campaign underway?

60. The Employer did not concede that the circumstances giving rise to the pending ULP proceeding occurred at a time when a campaign to establish bargaining rights was underway.

61. At the Consultation, the Board indicated to the parties that based on the material filed it was satisfied that a campaign was underway at the relevant time. In this regard, the Labourers filed with the Board membership evidence collected in connection with its organizing campaign. The Board's review of the membership evidence confirms that a campaign was taking place in November and December 2009. The Board's review of the membership evidence submitted is consistent with the declaration of Carlo Ricci, an organizer for the Labourers' Local 506, in which he declared that from November to December 2009 the Labourers, through its affiliate Local 506, had initiated an organizing campaign to secure bargaining rights for the employees of Percon.

62. In addition, there is undisputed information identified in some of the employer declarations and answers provided at the Consultation (i.e. in particular the declarations of Jadilebovski, Carr and Perricone) that make it clear that union organizing was taking place prior to the disputed lay offs.

iii) 98(2) para. 3: Irreparable Harm or Significant Labour Relations Objectives

63. With regard to section 98(2) paragraph 3 of the Act, the Board finds that the immediate reinstatement/recall of Mercer, Ibrahim, Downey, McKnight, Summers and Lee is necessary to prevent irreparable harm to the Labourers organizing campaign. These individuals were supporters of the Labourers campaign and Lee was an inside organizer. The Board, on a number of occasions, has found that the termination of a certain union supporters (as opposed to a key inside organizer) is detrimental to a unions effort to organize a workplace, in that, both a chilling effect upon the other employees occurs and it takes away an important link to the employees at the workplace (see *Metrican Stamping Co. Inc., supra* para. 47).

64. In *Sarnia Paving Stone Ltd.* 2005 CanLII 35997 (ONLRB) (October 3, 2005), at para. 38 the Board commented:

> … a finding of irreparable harm "is virtually inherent where, as here, the termination of the key inside organizer occurs during an organizing campaign …". The Board has long recognized that such a termination will not only make other employees hesitant about joining a union, but it would likely interfere with an employee's freedom to support a union in a vote, or to cooperate with and assist the union in its litigation with an employer. Reinstatement would clearly be necessary to mitigate against these effects. ***The same sentiments would, in my view, be generally applicable to the termination of a known union supporter, particularly where his termination occurs around the same time as that of the key organizer.***
>
> (emphasis added)

65. In this matter, the Board notes that the remaining five (5) employees to be reinstated were all laid off around, or at the same time as, one of the key inside organizers (Lee). Whether Lee's

initial layoff was an inadvertent mistake or something more does not change that the initial perception would link/associate the five (5) laid off employees with Lee.

66. The Employer argues that it was not aware of Lee's role nor was it aware as to whether the other laid off employees supported the Labourers or not. The Board has commented that the establishment of irreparable harm is not necessarily dependent on the employer's knowledge of the employee's role or support (see para. 39 *Sarnia Paving and Stone Ltd., supra*). In any event, the Employer's denials must be considered in the face of the taped audio conversations which suggest the Employer may have suspected the laid off employees supported the Labourers.

67. In *Alaska Sash Door and Window Corp. Ltd. o/a Alaska Wood Industries* 2006 CanLII 37837 (ONLRB) (November 8, 2006), the Board made the following comments, at paragraphs 25 to 27, which relate to the Employer arguments cited above:

> 25. None of the company's declarations allude to the level of employee awareness concerning Mr. Walsh's termination. There is no compelling explanation to counter the union's theory as to why, almost immediately following the cessation of Mr. Walsh's employment, no worker would speak to the union at all on September 25, 2006. I am left to surmise that Mr. Walsh's termination had something to do with the workers' silence.
>
> 26. The company submits further that there is no irreparable harm to the union's organizing drive because there is nothing to suggest Mr. Walsh was a key organizer, or that Alaska management had any idea that he might be. Moreover, Alaska contends that it is possible to conclude, based upon the union's declarations, that workers other than Mr. Walsh are assisting the union by providing information, and thus enabling the union to continue its organizing campaign if it so wishes.
>
> 27. In my view, it is not particularly significant whether or not there were or are other Alaska workers assisting the union, and whether or not management at Alaska knew anything about the substance of Mr. Walsh's contact with the union. In *K2 Electrical Contracting Ltd.*, [2006] OLRB Rep. May/June 375, it did not matter that the terminated employee had never acted in the capacity as an inside organizer. It was sufficient that he was to have fulfilled that role. Based on the union's uncontested pleading in this case, it is clear that Mr. Walsh was to have assisted the union as an inside organizer, whether or not he actually performed any duties as such prior to his termination. And as far as Alaska's contention that there might be other workers who are acting as inside organizers, if that is so, the organizing campaign appears to have stalled in any event, immediately following upon Mr. Walsh's departure.

68. Similarly, the Board in *Tate Andale Canada Inc.* [1993] O.L.R.B. Rep. 1019, at para. 53, commented as follows:

> In other words, whether or not the employer is ultimately successful on the main application, the sequence of events under review is likely to inhibit the free exercise of employee rights, unless there is some positive and tangible assurance that those statutory rights will be protected. If an outsider regards

> these discharges as at least suspicious, an employee in the workplace would reasonably fear the consequences of his/her involvement with the union…

69. As was the case in *Alaska Sash Door and Window Corp., supra*, none of the Employer's declarations allude to the level of employee awareness concerning the layoffs. I am also left to surmise that the layoffs of the individuals had something to do with the hostility and lack of success the Labourers are now encountering in its ongoing campaign. Likewise, the fact that key organizers remain does not seem to have altered the Labourers' difficulties it is now encountering.

70. At the Consultation, the Employer indicated that the timing of the layoffs may look somewhat suspicious. The Board, as identified in paragraph 89 of this decision, also questions the timing. If an outsider regards the layoffs as at least suspicious, the Board has found that employees in the workplace would reasonably fear the consequences of their involvement with the union (see *Tate Andale Canada Inc., supra*). I agree.

71. The Board is of the view that the six (6) supporters of the Labourers, one of whom is a key inside organizer, being removed from the workplace in the midst of a campaign, on the eve of the open period, cannot be seen as a neutral event and it would be totally unrealistic to expect the remaining employees to regard it that way.

72. The Labourers argue that its campaign is not over, but in the interim, remedial relief is necessary in order to ensure the Union is seen as effective and to assist in the continued support, co-operation and testimony of the laid off employees as well as employees who remain employed at Percon, as it concerns the upcoming ULP application (see *Sarnia Paving Stone Ltd., supra* at para. 38; *AXA Electric Inc.*, 2006 CanLII 40452 (ONLRB) (December 1, 2006) at para. 36 and *Cornwall Gravel Co. Ltd.*, 2006 CanLII 22588 (ONLRB) (June 30, 2006) at para. 16).

73. In this matter, the period of time between now and the determination of the pending ULP will be a particularly difficult period, especially if the open period has closed with no displacement application being filed. During this period, employees may feel that they have had no tangible benefit from supporting the Labourers and indeed are at some risk for doing so. If that perception is not altered I agree the Labourers will suffer irreparable harm in terms of the potential for erosion of support and its ability to obtain evidence in the pending ULP application.

74. Accordingly, the Labourers have persuaded me that reinstatement is necessary to prevent irreparable harm to the union's organizing campaign. Given this outcome, I need only deal briefly with the union's assertion that the interim relief is also necessary to achieve significant labour relations objectives.

75. Unlike a conventional organizing campaign involving a non-union employer, the employees of Percon are no longer free to choose at any time who they wish to represent them in their employment relations with Percon. In Percon's case, there is a three (3) month window of opportunity at the end of the collective agreement's term in which employees of Percon have the statutory right to decide if they wish to continue with the incumbent bargaining agent or make a change. One such outcome could be the selection of another bargaining agent by way of a displacement application and a secret ballot vote. The Labourers argue that early intervention, by way of reinstatement of the laid off employees, is necessary in order to protect the right to choose during the statutory open period. If interim relief is not granted, the open period will close prior to

the hearing and final decision in the pending ULP complaint. If interim relief is not granted, the laid off employees, who are only eligible to vote in a displacement application, if at work on the date of application, will effectively be denied their right to choose.

76. The Board is in agreement that in the circumstances of this case, the Labourers' interim relief is warranted in order to fulfill the significant labour relations objective and purposes associated with the statutory open period. Accordingly, the Labourers have also persuaded me that reinstatement is necessary in order to fulfill a significant labour relations objective.

iv) 98(3) para. 4: Balance of Harm

77. The Employer submits that, if the Board reinstates the laid off individuals it will suffer financial hardship. The Employer states it has no additional work for the laid off employees and might have to breach the subcontract entered into with the masonry contractor.

78. The Employer also asserts that harm occurs to its management rights and its collective agreement as an order has the effect of overriding the seniority provisions of the collective agreement.

79. The Board disagrees. It does not see the interim relief as overriding the collective agreement between Percon and Local 52. There is an argument that both the contracting out, as well as the layoffs were not in accordance with the collective agreement. In any event, the provisions of a collective agreement cannot be used as a shield in order to trump the enforcement of the statutory rights the Board is entrusted with upholding.

80. In addition, the responding party's claim that there is no work must be considered in the face of: i) the distant occupancy dates associated with the projects, which would suggest otherwise; ii) some of the construction labourer work is presently being performed by a company, Rockwell, in which Percon has an interest; iii) the build-up in Percon's construction labour workforce, which was still occurring in the middle of December, occurred with Percon knowing the Milton #1 project was at risk or even if the project was saved, would not begin for a significant number of months. This leaves one to infer that Percon's manpower needs, prior to any knowledge of an organizing campaign, had been assessed at a level that included the laid off employees regardless of what happened to the Milton #1 project.

81. As it concerns the issue of financial cost, the Labourers rely on the cases of *Alaska Sash Door and Window Corp. Ltd., supra* and *Clayson Steel (1998) Inc.*, 2007 CanLII 913 (ONLRB) (January 19, 2007), in which the Board declined to find the financial cost associated with reinstated/recalled employees outweighed the irreparable harm to the union.

82. In this matter, the Board is of the view that the economic harm to the Employer does not outweigh the irreparable harm and the labour relations objectives that will be achieved by granting interim relief. The balance of harm favours the granting of interim relief pending the outcome in the pending ULP complaint.

s. 98(3) Is there an appearance that the lay off/loss of employment of the individuals involved were unrelated to the exercise of their right under the Act ?

83. The Board's task under subsection 98(3) of the Act is not to make findings of fact concerning a causal relationship between the layoffs of the individuals and the exercise of their rights to join a union. As the Board observed at paragraph 67 of *Patrolman Security Services Inc*. 2005 CanLII 38038 (ONLRB) (October 6, 2005), a section 98(3) inquiry "is like a preliminary assessment of the quality or robustness of the evidence likely to be heard and tested in the pending application".

84. In *Patrolman Security Services Inc., supra*, the Board commented further on the type of inquiry section 98(3) requires, at paragraph 68 of the decision:

> Such an inquiry is not a detailed one. It would defeat the nature and purpose of the expedited process if either the process of the inquiry itself, or the description of the information and the analysis in the reasons provided were to go into great detail. In the usual case, the inquiry as well as the findings and reasons would be brief, issued shortly after the inquiry was completed.

The Board in this matter adopts the above comments and approach taken by the Board in *Patrolman Security Services Inc., supra.*

85. The difficulty in this case is that the factual disputes are numerous and significant. There are two stories being advanced, both of which put forward an arguable case. However, as the Board stated in *UPS Supply Chain Solutions Inc*. 2005 CanLII 34270 (ONLRB) (September 14, 2005) at paragraph 35:

> In my view an approach which equates 'appears' with an 'arguable' case is too low a standard and would essentially eliminate the possibility of interim reinstatement in virtually every case. Employers are seldom going to admit to breaking the law and will usually have an explanation which at least could meet an arguable case standard. 'Appears' must mean something more.

86. The Board in *SITEL Customer Care Inc*. 2006 CanLII 27540 (ONLRB) (August 9, 2006), at paragraph 46, made the following comments which I adopt and find relevant to the circumstances in this matter:

> 46. I agree with the Board's analysis in *K2 Electrical*. In some cases the results of the application may be clear. However, in difficult cases, like this one, the Board's task is to carefully examine the material filed by the parties and the answers given by the declarants to questions asked by the Board or the parties at the hearing (which was a process that parties declined to engage in this case) and determine whether there are "gaps" or significant inconsistencies in the factual assertions advanced by the parties. Or to put it another way, in these cases the Board must assess the two stories and ask itself whether it appears the conduct of the employer is (applying the Board's experience) the conduct of an employer which is engaged in a process free of anti-union animus.

87. In this case, the Labourers have demonstrated that the Employer has not met the above test cited in *SITEL Customer Care Inc., supra.* Having assessed the two stories being advanced and having reviewed the material, the Board finds that there are "gaps" or significant inconsistencies in the factual assertions which result in an appearance that the conduct of the Employer may not be free of anti-union animus. For example, the quality and robustness of the Labourers evidence, such as the taped audio recordings, give the appearance that the lay offs are causally related to the exercise of rights under the Act. The requirement of section 98(3) has been satisfied, permitting the Board to grant the relief described in section 98(1) of the Act.

88. It appears to the Board that something else maybe going on here and it may well relate to the fact that the open period was fast approaching and the Employer, suspecting that its Glenn Gould site had been the base for union organizing and/or suspecting the newly hired labourers were supporters or sympathetic to the Labourers, decided to embark upon a significant layoff. It therefore does not appear to the Board that the layoffs and/or the timing of the layoffs were unrelated to the exercise of rights under the Act. Accordingly, section 98(3) does not apply so as to prevent the Board from exercising its discretion to reinstate the applicable laid off employees to their employment.

89. The following information is significant and assists the Board in this conclusion:

The Knowledge and Conduct of the Employer

- Contrary to the Employer's pleadings and initial declarations, it appears the Employer did have knowledge of the Labourers organizing campaign at least prior to the layoffs that occurred on December 22 and 23, 2009.
- The audio recordings, involving some management persons give the appearance that Percon may have harboured anti-union animus towards the Labourers and did not want them to be successful during the open period.

Timing of the Layoffs

- The layoffs occurred very soon after Local 52 and the Employer appear to have knowledge that there was an organizing campaign by the Labourers.
- The layoffs occurred even though there were a number of projects whose occupancy dates were far in the future.
- The layoffs appear not to be in compliance with the collective agreement, ie. no consultation with union prior (art. 13.04); no four (4) hour notice (art 13.06); layoffs did not occur on a Friday (art. 13.06) (the Board notes Friday was Christmas, however, the rush to layoff just prior to Christmas raises questions of timing).
- The decision to contract out at Glenn Gould seems unusually quick (ie. only after a few days of hiring the new construction labourers; right before Christmas; with no report back from Adams who, on the employer's version of events, was asked to "keep an eye" on the masonry contractor; no direct first hand declarations from the masonry

contractor; and no information from the Employer as to its history of contracting out such work). Further, the contracting out appears not to be in compliance with article 3.02 if the collective agreement.

The Number of Layoffs

- The Employer has no detailed explanation as to why seven (7) employees (ie. approximately 30% of its construction labour workforce) were chosen for layoff.

- The layoffs at Block 18 and St. Michael's sites leave many unanswered questions. The contracting out at Glenn Gould did not impact Block 18 or St. Michael's. The backfilling which was scheduled to occur at Block 18 was not happening until early January, and in any event, Downey had been hired with the knowledge that the company Rockwell would be doing the backfilling in January.

Disposition

90. The Board orders Percon Construction Inc. to:

a) recall and reinstate Matthew Downey, Arslan Ibrahim, Alfranca Lee, James McKnight, William Mercer and Chad Summers to their employment as construction labourers on the same terms and conditions they enjoyed immediately prior to their respective layoffs/loss of employment;

b) refrain from laying off from employment, Matthew Downey, Arslan Ibrahim, Alfranca Lee, James McKnight, William Mercer and Chad Summers, or changing the terms and conditions of their employment until the Board issues final decisions in the unfair labour practice complaint (Board File No. 2963-09-U), except with the consent of the Labourers International Union of North America, Ontario Provincial District Council or the Board, on application by the responding party;

c) post a copy of this decision and the attached "Notice to Employees" at its various projects in conspicuous locations where the responding party's employees are likely to see it;

d) keep the copies of this decision and the attached "Notice to Employees" posted for not less than 30 days.

91. I remain seized to deal with any issues arising out of the implementation of this decision.

1025-07-ES TRG Customer Solutions Inc., Applicant v. Aimerance Kabongo, and Director of Employment Standards, Responding Parties

Employment Standards – The employer sought review of an order to pay compensation for alleged violations of the pregnancy provisions of the *Employment Standards*

***Act, 2000* – The employee worked as a customer service representative for the employer who operated a call centre – Employees were engaged in campaigns handling either inbound calls (assisting callers with purchases they had already made) or outbound calls (offering products for sale to current or new customers) – The employee's work history showed that she had worked almost exclusively on the inbound side of the operation prior to her last leave – When she returned from her leave, the employer was winding down two inbound campaigns and assigned the employee to outbound work – Following several months in the new position, where the employee performed less successfully than her colleagues, she was terminated – The employer conceded that the employee was entitled to termination and severance pay, but challenged the order for compensation – The Board found that the inbound and outbound position were not substantially and qualitatively the same, and the employee held an inbound position when her leave commenced – At her return, there was no inbound position to which she could return – The Board held that the outbound position was sufficiently comparable to the inbound position to fulfil the employer's obligations to place the employee following her leave – Order amended accordingly; termination and severance pay payable**

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Rishi Bandhu* and *Duncan Cornthwaite* for the applicant; *Mercedes Ibghi*, *Benjamin Bajik* and *Aimerance Kabongo* for the responding party employee; no one appearing on behalf of the Director of Employment Standards.

DECISION OF THE BOARD: January 21, 2010

1. This is an employer application under the *Employment Standards Act, 2000*, as amended for review of Order to Pay No. 31015.

2. The style of cause is amended to reflect the current name of the applicant: TRG Customer Solutions Inc. ("TRG" or "the company").

Background

3. The Employment Standards Officer found that the applicant contravened the pregnancy/parental leave provisions of the Act in respect of Ms. Kabongo, and ordered the applicant to pay loss of wages, termination pay and severance pay, as well as an administrative fee, for a total of $41,179.29.

4. The applicant takes the position that it reinstated Ms. Kabongo upon her return from her last pregnancy leave, and that it did not contravene the pregnancy/parental leave provisions of the Act. It contends it is not liable for any of the compensation ordered by the Officer in respect of the alleged pregnancy leave violations, and in any event, it says that the Officer's determination regarding the quantum of compensation is in error. At the commencement of the hearing, however, the applicant conceded Ms. Kabongo's entitlement to termination and severance pay under the Act, but based upon a calculation different from that used by the Officer.

5. Ms. Kabongo takes the position that the Officer's order to pay was correct except in one respect. She says that the Officer ought to have calculated loss of wages from the date of Ms. Kabongo's termination from employment on May 16, 2006 rather than from July 7, 2006.

The Evidence

6. The company presented its evidence first. It called: Nishat Tabassum, an administrative assistant of TRG who spoke with Ms. Kabongo shortly before and on the day in December 2005 when she returned from her pregnancy leave; King Guerrero, the company's Site Director; Iqbal Khan, a TRG supervisor who was responsible for Ms. Kabongo for a short period of time near the end of her employment with the company; and Irene Harmidarow, the company's HR Manager who, at the time she commenced her testimony on June 18, 2008 was not expecting to be employed by TRG beyond July 23, 2008 due to the closure of the company's operations.

7. Ms. Kabongo testified on her own behalf.

8. The company operated a call centre in Toronto during the period of Ms. Kabongo's employment. At the time she began working there, on January 10, 1996, the call centre operated under the name S & P Data. Prior to her first day of work, Ms. Kabongo signed a document prepared by the company, entitled "Conditions of Employment". It does not refer specifically to Ms. Kabongo's job title or her day-to-day job duties. It does, however, contain acknowledgements by Ms. Kabongo that she might be asked to work a different shift and/or on a different project or in a different area than the shift, project or area for which she was initially hired.

9. Mr. King provided a good deal of testimony concerning the business of TRG and the kinds of telemarketing services it provided on behalf of its clients. Counsel for Ms. Kabongo urged me to view Mr. King's evidence with a great deal of caution because he only became employed by the TRG several months after Ms. Kabongo's termination on May 16, 2006. While I agree that I ought to disregard anything Mr. King had to say about Ms. Kabongo's employment and the circumstances concerning her dismissal, Mr. King's testimony about the company's operations is admissible and helpful to a degree. It became quite clear in the course of the hearing that the manner in which he operated the Toronto call centre was more or less the way it had been run while Ms. Kabongo was there. The "campaigns", which I will describe shortly, were fundamentally of the same nature, and Mr. King was in a position as the most senior manager in authority at the Toronto call centre to explain these campaigns in some detail, and to interpret the company's records even though some of them pre-dated his employment.

10. While I am on the subject of Mr. King, I want it to be clear that I do not treat his evidence as that of an expert. There was some confusion created at the outset of his testimony when counsel for the applicant questioned Mr. King about his "expertise" in the telemarketing business generally. Mr. King was never qualified as an expert in telemarketing. Accordingly, I have considered his testimony strictly in terms of his capacity as the person in charge of the Toronto call centre.

11. The Toronto call centre always provided two types of services or campaigns to its clients. One service was the "inbound" campaign. An inbound campaign is a service initiated by telephone calls from existing customers of retail clients who have already purchased a good or service (I shall refer to both as "the product") from the client and require further assistance. Their calls come into the call centre (inbound calls) and are answered by employees, like Ms. Kabongo, who were referred to in the course of the hearing as "agents", "customer service representatives", "telemarketing service representatives" and "communicators". For convenience, I shall refer to the workers who speak to customers over the phone as customer service representatives ("CSRs"). The CSRs assigned to an

inbound campaign attempt to answer whatever concern the customer may have about his or her product.

12. The other type of service provided by the company is the outbound campaign. To put it in its simplest terms, outbound campaigns involved the CSRs selling products to new customers, or new products to customers who had already purchased a different product from the same retail client.

13. Ms. Kabongo was initially employed in an inbound campaign, and in fact, except for a brief period in around 1998, worked exclusively on inbound campaigns until the last five months of her employment. During that final period, she was assigned to an outbound campaign.

14. There are several features of an outbound campaign that differ from inbound campaigns. The Toronto call centre tended to run inbound campaigns during the mornings and afternoons. Prior to her pregnancy leave, Ms. Kabongo generally worked a shift from 8:30 a.m. until 4:30 p.m. The outbound campaigns generally ran in the late morning or early afternoon until the evening, as late as 9:30 p.m. About half the outbound campaigns also featured a verification process not found in the inbound campaigns. That is, when a CSR on an outbound campaign finalized a sale, the customer was transferred to a Verifier for the purpose of making "legal disclosure", as Mr. Guerrero put it. Verifying is the act of ensuring that all aspects of the sale were done properly. Ms. Kabongo's sole experience in outbound campaigns was a stint of several months in 1998 when she worked as a Verifier.

15. All campaigns, whether inbound or outbound, involve some level of training and familiarization by the CSRs when they are newly assigned, even if they have previous experience in other campaigns. The degree of training depends, at least in part, on the technical complexity of the client's product.

16. CSRs in inbound campaigns are evaluated somewhat differently than CSRs working on the outbound campaigns. The principal difference is that the outbound CSRs are measured on sales per hour, whereas the inbound CSRs are not. Both types of CSRs are expected to handle as many calls as possible and to be in a state of readiness to make or receive calls.

17. When Ms. Kabongo left to commence her third pregnancy leave in December 2004, she had been working for approximately the previous four years on what was known as the Sunbeam/Coleman inbound campaign. She was dealing with customers who had purchased various types of camping equipment, including stoves and tents. The training of the CSRs for this campaign consisted of approximately one day of hands-on orientation to the camping products in which, for example, the CSRs learned to pitch a tent in order to be better positioned to explain the process to customers calling in with their questions about tent assembly. At the time Ms. Kabongo took her leave of absence, she was earning $13.90 per hour plus a $2.00 per hour bilingual premium payable to her on account of her dealing with callers in French. The bilingual premium was paid to any French or Spanish speaking CSR in any campaign, inbound or outbound, in which there were targeted French or Spanish speaking customers.

18. When Ms. Kabongo returned to the company on December 12, 2005, the Sunbeam/Coleman inbound campaign had run its course. There were two inbound campaigns providing customer technical support in respect of the operation of approximately twelve models of a pressure washer product. One of these two inbound campaigns was a unilingual campaign for a U.S.

based company, FAIP, and the other was an English/French campaign for a Canadian retailer, Winners. The CSRs assigned to these campaigns worked on both of them. Both of these inbound campaigns had an "upselling" feature: the CSRs were expected to sell related products in addition to dealing with the customers' inquiries and problems with the existing pressure washers.

19. As well, the Toronto call centre was conducting a few outbound campaigns (none in French, however), including an English/Spanish campaign for SBC/AT&T, which I shall refer to as the SBC campaign. The SBC campaign was aimed at upgrading the customers' existing internet service from telephone dial-up to a higher-speed service. According to Mr. Khan who was one of the supervisors on the SBC campaign, and previously had supervised the FAIP/Winners campaign, it required far less technical knowledge on the part of the CSRs than the FAIP/Winners campaigns. He estimated that an experienced CSR could learn outbound work in a matter of hours and within no more than one day. It turned out that the SBC campaign is where Ms. Kabongo ended up on her return from her pregnancy leave.

20. By the time Ms. Kabongo returned to work on December 12, 2005, the FAIP and Winners campaigns were winding down as a result of the clients' decisions to conduct the inbound function from Pakistan rather than Toronto. The only Toronto employees answering customer calls on the FAIP and Winners campaigns during this period were the most experienced of the CSRs, and their function was to deal with only those customer inquiries that were beyond the ability or experience of the employees in Pakistan. Whereas there had been about 70 CSRs working on these campaigns in the Toronto centre during the previous summer, in December there were no more than eighteen of them still taking calls that could not be answered in Pakistan. From December 2, 2005 until the termination of all work on the FAIP and Winners campaigns by February 24, 2006, there was, with the very rare exception, a steady weekly decline in the hours worked by the remaining CSRs. By late December 2005 or early January 2006, Mr. Khan was no longer needed as a supervisor on the FAIP/Winners campaigns, and he was moved over to assist in the supervision of the SBC outbound campaign. Moreover, the period of training of CSRs on the pressure washers for the FAIP and Winners campaigns was extensive, between three and six weeks for even an experienced CSR, including up to three to four weeks classroom/practical training and as much as two weeks on the call centre floor. According to Mr. Khan, they required much greater technical knowledge than the Sunbeam/Coleman campaign that Ms. Kabongo had worked on. I accept therefore, that the company was not, from a practical perspective, in the position to consider adding CSRs to the FAIP and Winners campaigns in December 2005 when Ms. Kabongo arrived back at work. I note too that there was no inbound work being done at all at the time Ms. Kabongo's employment was terminated in May 2006. In fact, it was not until 2007 that the company again ran an inbound campaign.

21. There were some discrepancies in the accounts of a telephone conversation by Ms. Kabongo and Ms. Tabassum, the administrative assistant who spoke to Ms. Kabongo several weeks prior to her expected date of return from pregnancy leave. In my view, it is not necessary to resolve those discrepancies. What is clear is that when Ms. Kabongo showed up for work on December 12, 2005, the company was not particularly well-prepared for her return. Sherry Abbas, a representative in the Human Resources department, seemed surprised to see Ms. Kabongo, and it took some time that day before Ms. Kabongo was, to her chagrin, finally assigned by Ms. Abbas to sit with and observe a CSR on the outbound SBC campaign for the remainder of the day. Ms. Kabongo had expected an assignment to the Winners inbound campaign, which required her French-English language skills. She had not anticipated being posted to a Spanish-English outbound campaign whose hours of work did not conform to her child care arrangements and did not afford her the

opportunity to earn a bilingual premium. That, however, was the only option the company was prepared to consider, and Ms. Kabongo remained in the SBC outbound campaign until her employment was terminated several months later.

22. By her own admission, Ms. Kabongo did not do well in the SBC campaign. She asked several times to be permitted to join the Winners campaign. The company was not prepared to do so for the reasons already described, and encouraged Ms. Kabongo to persevere. Compared to her co-workers on the SBC campaign she lagged well behind in completing sales. In her view, this was entirely due to her personality which she contended lacked the aggressiveness required to persuade customers to buy the offered service. The company, on the other hand, adduced evidence which it says established that the real problem was Ms. Kabongo's failure to put in the necessary effort. The company insisted that the work of CSRs and the skills required to carry out that work, whether in inbound or outbound campaigns, are fundamentally the same. Accordingly, the company concluded that Ms. Kabongo, disenchanted with her assignment to an outbound campaign, did not make the necessary effort to succeed in that role. In my view, for reasons that will become apparent later, it is not crucial to arrive at a precise conclusion as to why Ms. Kabongo failed in the SBC campaign, particularly as the company does not dispute that she was entitled to termination pay and severance pay. I suspect there is some validity to both parties' positions. Ms. Kabongo's work experience with the company was almost exclusively inbound campaign experience. She had become accustomed to the role of dealing with customer inquiries about products they had already purchased. She did not relish her new, sales-driven role, and any resulting de-motivation could have been a contributing factor in her failure to thrive as she had done in the past. I do not need to come to a firm conclusion on the reason or reasons. What is important, and beyond any doubt, is that Ms. Kabongo performed well below the standards expected of a CSR in an outbound campaign. Moreover, she received a degree of input from her supervisors with respect to the problems in her performance, and several written warnings that her work was unsatisfactory, culminating in a final warning and, ultimately, her termination.

23. It is also undisputed that, beginning in the latter part of January 2006, Ms. Kabongo worked fewer than the full-time hours she would otherwise have been entitled to work. Why this occurred is a matter of dispute. Ms. Kabongo testified that, as her rate of sales declined, her supervisors reduced her scheduled hours, and directed her to come into work only during periods when they thought she had a better chance of completing sales. The company's evidence was that it did not typically reduce the hours of full-time CSRs, that supervisors did not have any such authority, and any such reduction would be initiated by employee requests for time off. Again, I do not think I must resolve this discrepancy in the evidence. The reasons for the reduction in hours – whether it was pursuant to a form of disciplinary response by the company or the result of Ms. Kabongo's requests for personal time off – are not critical to the outcome in this case. The fact of the matter is that Ms. Kabongo worked substantially fewer hours in the period leading up to her dismissal. Furthermore, counsel for Ms. Kabongo did not argue in her final submissions that the reduced workload was a form of reprisal. Even had she done so, the evidence does not support such a conclusion.

24. When Ms. Kabongo was terminated on May 16, 2006, she was earning $13.90 per hour. When she commenced her maternity leave in December 2004, she was earning $13.90 per hour plus the $2.00 per hour bilingual premium.

Analysis and Conclusions

25. The provisions of the Act relevant to the issues in dispute are as follows:

> **53.** (1) Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.
>
> . . .
>
> (2) Subsection (1) does not apply if the employment of the employee is ended solely for reasons unrelated to the leave.
>
> (3) The employer shall pay a reinstated employee at a rate that is equal to the greater of,
>
> (a) the rate that the employee most recently earned with the employer; and
>
> (b) the rate that the employee would be earning had he or she worked throughout the leave.

26. Counsel for the applicant cited the following authorities in final argument: *Ontario New Democratic Party Caucus* [1993] O.E.S.A.D. No. 117 (February 15, 1994); *Med-Chem Laboratories Ltd.* [1997] O.E.S.A.D. No. 237 (March 10, 1997); *Elementary Teachers Federation of Ontario v. Toronto District School Board* [2005] O.J. No. 4368 (Ontario Court of Appeal); *Elementary Teachers Federation of Ontario v. Toronto District School Board* [2004] O.J. No. 2886 (Divisional Court); *Holborne Distributing Co.* [1997] O.E.S.A.D. No. 385 (May 23, 1997); *Pitts Donut Ltd.* [1998] O.E.S.A.D. No. 225 (April 30, 1998); *Judith Buys Dentistry Professional Corp.* [2008] OLRB Rep. Sept./Oct. 641 (September 10, 2008); and *Dr. Marites Rosario* [2002] OLRB Rep. May/June 505 (May 7, 2002). Counsel for Ms. Kabongo referred me to *Canadian Bonded Credits Ltd.*, 2003 CanLII 47178 (ON L.R.B.) and *Sandtastik Inc.*, [2005] OLRB Rep. July/August 700 (July 6, 2005). I have reviewed and considered these authorities (to the extent I found them helpful) in arriving at the conclusions below.

27. The first issue to be determined is the identification of the "position" Ms. Kabongo most recently held with the company when she commenced her leave of absence. The company submits that she was, simply, a CSR without any affiliation with inbound or outbound campaigns. Counsel for Ms. Kabongo, on the other hand, says her client occupied an inbound campaign position. In my view, the evidence taken as a whole supports Ms. Kabongo on this issue. It is true that the written terms and conditions applicable to Ms. Kabongo at the outset of her employment make no distinction between inbound and outbound work. Furthermore, I accept the company's evidence that it did not intend to create a classification system based upon any distinction between inbound and outbound work. Nevertheless, Ms. Kabongo's entire employment was almost exclusively devoted to inbound campaigns. Up until the last six months of her employment, she had never once been employed as a CSR in an outbound campaign. Furthermore, on each of the two previous occasions on which she took pregnancy leave, she was reinstated to an inbound campaign. As a matter of fact, in the approximately four years preceding her third and last pregnancy leave, she worked exclusively on the Sunbeam/Coleman inbound campaign. I therefore find that her most recently held position when she

commenced her last pregnancy leave was that of an inbound CSR. I further find that an outbound CSR position is not "substantially and qualitatively the same" as an inbound CSR position. There are similarities of course, but the outbound position exists mainly if not exclusively for the purpose of selling products and services, whereas the main purpose of the inbound position is to assist consumers with their inquiries on the use of their purchased products and services. Moreover, the positions are evaluated by the company using somewhat different criteria.

28. The second issue is: did an inbound CSR position exist at the time Ms. Kabongo returned from her pregnancy leave? Counsel for Ms. Kabongo submits that there was such a position available, and it was in the FAIP and Winners powerwasher campaigns. Counsel for the company submits that, for all intents and purposes, those campaigns were over. I agree with the company on this point. The evidence clearly established the following:

- Ms. Kabongo would have required at least four, and as many as six, weeks of training to be in a position to take calls on the FAIP and Winners campaigns, meaning that she could not have started earlier than January 12, 2006 to field live customer calls;

- By the time Ms. Kabongo returned to work in mid-December, the company's clients had pulled the FAIP and Winners campaigns and transferred them to a different entity in Pakistan, and there was only a fraction of the Toronto CSRs remaining whose task it was to deal with calls that the Pakistani call centre could not;

- The work of the remaining Toronto CSRs on the FAIP and Winners campaigns dropped steadily on a weekly basis from January 2006 until near the end of February 2006 when there was no discernible activity at all in the campaigns.

29. I find that, in the circumstances of this case, for all intents and purposes Ms. Kabongo's most recently held position of an inbound CSR did not "exist" when she returned to work.

30. The third issue concerns whether or not the SBC campaign position was a comparable position to an inbound CSR position. Despite counsel for Ms. Kabongo's assertions to the contrary, in my view the position in the outbound SBC campaign was comparable to an inbound position. In *American Can Canada Inc.*, August 15, 1983 (Picher) E.S.C. 1464, the Referee set out at page 10 of the decision a non-exhaustive list of factors that might be used in the assessment of comparability of positions, including job location, hours of work, quality of the working environment, degree of responsibility, job security and possibility of advancement, and prestige and perquisites. Applying these factors to the case at hand, it is clear there is little to distinguish the SBC outbound position from an inbound position. Both positions were located in the same call centre, and subject to the same physical working environment. Both were full-time positions, although they did not share the same shift schedule. Both were subject to the same compensation structure. There was no evidence to suggest that one position was qualitatively more responsible or prestigious than the other, and no evidence that either position held an advantage over the other in terms of job security or opportunities for advancement. Both positions had an important customer-service component. Moreover, the SBC outbound program was essentially an "upselling" program. The customers were individuals who had

already purchased an internet service. The goal of the SBC program was to persuade these customers to upgrade to a faster internet connection, a form of upselling. Upselling was something Ms. Kabongo had done previously in an inbound campaign. For all these reasons, I find that, despite the different shifts, the SBC campaign position was comparable to the inbound position Ms. Kabongo last held prior to her pregnancy leave.

31. The fourth issue is whether or not the company paid Ms. Kabongo in accordance with subsection 53(3) of the Act. The company was obligated to pay her the greater of the rate she most recently earned and the rate she would be earning had she worked throughout the leave. Since there was no evidence that Ms. Kabongo would have earned any greater rate had she worked throughout her pregnancy leave, the issue is whether or not, upon her return, she was paid the rate she earned just prior to the commencement of her pregnancy leave.

32. The statutory predecessor provision to subsection 53(3) required an employer to pay a reinstated employee the greater of the "wages" she was last paid and the "wages" she would be earning had she worked throughout the pregnancy leave.[1] In *Pitts Donut Ltd.*, [1998] O.E.S.A.D. No. 225 the Adjudicator/Referee rejected the employer applicant's argument that, under subsection 43(3) of the Act as it then was, it was not required to pay the reinstated employee a $10 shift bonus she had previously earned for extra work because she was no longer required to do the extra work upon her reinstatement. The Adjudicator/Referee interpreted the statute as guaranteeing the employee all the wages she had received prior to her leave of absence, including the bonus.

33. I note that the definition of "wages" in the Act and in the predecessor statute has not changed. The definition is far-reaching in its scope. The Legislature has seen fit to replace the defined term "wages" with the phrase "at a rate". To my mind, that signals a narrowing of the obligation imposed upon employers regarding the issue of remuneration upon reinstatement. The question is not what wages was Ms. Kabongo most recently earning prior to her pregnancy leave, but rather what rate of pay she was then earning. It was undisputed that her hourly rate was $13.90 and that, while employed in the Sunbeam/Coleman inbound campaign, she was also earning a bilingual premium of $2.00 per hour due to her use of French in addition to English. The SBC outbound program paid her $13.90 per hour, but no bilingual premium because she did not possess the Spanish language skills used in that program. Ms. Kabongo herself conceded in the course of her testimony that, generally, she did not expect to be paid a bilingual premium in circumstances where she was not asked to use her bilingual skills. In the circumstances of this case, I conclude that Ms. Kabongo was reinstated at the rate (the hourly rate of $13.90) that she most recently earned prior to her leave of absence.

34. The company complied with all of the applicable provisions of section 53. There was no inbound position into which Ms. Kabongo could be reinstated upon her return to work, but the company reinstated her to a comparable position, and at the correct rate of pay. There is therefore no basis for a finding of any violation of that section of the Act. Moreover, counsel for Ms. Kabongo made no submissions in final argument that her client had been the subject of a reprisal under the Act. Consequently, there is no reason to question the reduction in Ms. Kabongo's hours of work starting in late January 2006 until the date of her termination in May 2006.

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[1] Employment Standards Act R.S.O. 1990, c. E.14, subsection 43(3).

35. Counsel for the applicant submitted that the calculation of Ms. Kabongo's termination pay and severance pay entitlements ought to be based upon an average of her wages over the last twelve weeks of her employment. I disagree with that submission. Subections 61(2) and 66(2) of the Act, which deal with the calculation of termination pay and severance pay respectively on a twelve week averaging, apply only where the employee does not have a regular work week or is paid on a basis other than time. Ms. Kabongo did have a regular work week, although she did not work all of the hours of her regular work week from late January until the end of her employment. That was because she was either taking time off with the consent of the company or she was being disciplined for poor performance. She ought not, as a result, to suffer any reduction in the calculation of her termination and severance pay.

36. The evidence disclosed that Ms. Kabongo's regular work week as an SBC campaign worker was 37.5 hours. At $13.50 per hour, her weekly earnings at the time of her termination, under normal circumstances, would have been $506.25. Her length of employment was from January 10, 1996 until May 16, 2006, a period of ten years and four complete months. She is entitled to $4,050 in termination pay (8 weeks' wages x $506.25) and $5,229.56 in severance pay (10.33 weeks' wages x $506.25), plus 4 per cent vacation pay on those amounts ($371.18), for a total of $9,650.74.

Disposition

37. The application succeeds in part. Order to Pay No. 31015 is hereby amended by deleting the order to pay compensation for wage loss. The Director of Employment Standards ("the Director") is authorized to pay Ms. Kabongo $9,650.74 from the monies paid in trust. The Director is entitled to $965.07 in administrative costs, part of which is to be satisfied from the remaining monies in trust, and the remainder of which the applicant is directed to pay forthwith to the Director.

0506-09-HS Xstrata Canada Corporation, Appellant v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers), Local 2020; Rick Kulyski, Inspector; and Canadian Auto Workers (CAW) Canada and its Local 598, Responding Parties

Health and Safety – An order was issued requiring Xstrata to have the first aid rooms located at each of two of the employer's mines in the charge of two different first aid attendants – The Board, differently constituted, dismissed Xstrata's application to suspend the operation of the Order pending disposition of this appeal – The Board found that the regulation used the term "readily available" not "immediately available" and there was nothing in the regulation precluding an employer from having two first aid rooms associated with two underground mines in the charge of the same individual when it is unlikely that first aid attendant will be required to administer first aid at the same time in two locations – The Board found that because the mines are not in production and there were relatively few employees working underground, it was unlikely that simultaneous first aid would be required at different mines – The Board found that while the mines remain out of production, Xstrata is in accord with the regulation by having the two first aid rooms in the charge of the same qualified first aid attendant – Appeal allowed; Order rescinded

BEFORE: *Harry Freedman*, Vice-Chair.

APPEARANCES: *Ben Ratelband* and *Mike Siemer* for Xstrata Canada Corporation.; *Shaheen Hirani* and *Marc Ayotte* for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers), Local 2020; *Joe Ferraro* and *Rick Kulyski* for Rick Kulyski and the Ministry of Labour; no one appearing for Canadian Auto Workers (CAW) Canada and its Local 598.

DECISION OF THE BOARD: February 5, 2010

1. The issue in this appeal under section 61 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 as am. (the "Act") is whether section 281.1(3) of Reg. 854, R.R.O. 1990 (Mines and Mining Plants) under the Act is contravened when two first aid rooms close to the entrances of two underground mines are "in the charge of" only one person who is a trained first aid attendant. In other words, does Reg. 854 allow an employer to assign only one properly trained first aid attendant to be "in the charge of" more than one first aid room.

2. The material portions of section 281.1 of Reg. 854 provide:

> (1) Every employer shall equip and maintain a first aid room close to the entrance of an underground mine.
>
> …
>
> (3) A first aid room shall be in the charge of a person,
>
> (a) who is certified in Advanced St. John Ambulance First Aid and in cardio-pulmonary resuscitation or who holds an equivalent qualification;
>
> (b) who is readily available; and
>
> (c) who does not perform other work of a nature that is likely to adversely affect the person's availability to administer first aid.

3. Inspector Rick Kulyski determined the appellant ("Xstrata") would be in contravention of section 281.1 if it had two first aid rooms established in accordance with section 281.1(1) "in the charge of" the same person. Mr. Kulyski issued an order under the Act on April 15, 2009 in F.V. No. 5260953 (the "Order") requiring Xstrata to have the two first aid rooms, one located near the entrance to the Fraser Mine and the other located near the entrance to the Craig Mine, in the charge of two different first aid attendants.

4. The Board (differently constituted), by decision dated June 8, 2009 (Board File No. 0507-09-OH) in dismissing Xstrata's application to suspend the operation of the Order pending the disposition of this appeal, considered section 281.1 but did not address the issue raised in this appeal. At paragraph 19 of that decision, the Board referred to the following submission filed by Mr. Kulyski and the Ministry of Labour opposing the suspension request:

> The Ministry states that subsection 281.1(3) of Reg. 854 is clear in that a person must be in charge of a first air [sic] room close to the entrance of an underground mine. Therefore, if the applicant operates more than one mine, a fist [sic] aid room is required at the entrance of each mine and each first aid room must be staffed by at least one in charge person.

The Board did not offer an interpretation of section 281.1 in that decision but made the following comment at paragraph 24:

> Without the benefit of evidence and full argument on the merits, it is impossible for the Board to determine the merits of the appeal, while the applicant will have a full opportunity to bring evidence and argument to support its position, at this point the Board is not satisfied that it is more likely than not that the applicant will be successful in its appeal on the merits.

Procedure At The Hearing

5. At the first day of hearing before me, the parties in attendance (The Canadian Auto Workers (CAW) Canada and its Local 598 ("Local 598") did not appear at that time nor did it file any material in relation to the appeal) ultimately reached agreement on most of the material facts and filed an agreed statement of fact. They explicitly reserved the right to adduce *viva voce* evidence to supplement the facts set out in their statement. At the continuation of the hearing, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers), Local 2020 ("Local 2020") called Marc Ayotte, a first aid attendant and president of Local 2020, unit 6855 to give evidence, and Xstrata called Mike Siemer, Xstrata's safety and training specialist who is responsible for the work carried out by the first aid attendants assigned to the Fraser and Craig Mines, as its only witness. Local 598 attended the next two days of hearing but neither it nor Mr. Kulyski called any evidence. At the conclusion of the parties' evidence, the hearing adjourned and one more day was scheduled for final argument.

6. When the hearing convened to receive the parties' arguments, Local 598 was not present. Local 2020 advised the Board Mr. Ayotte had been told by Local 598 that Local 598 would not be attending at the hearing because it was engaged in collective bargaining negotiations with Xstrata. Local 598 had prepared a written submission and had asked Mr. Ayotte to file that written submission with the Board at the hearing. Xstrata objected to the Board receiving and considering Local 598's written submission on a number of grounds, but principally because it contained a number of factual allegations that were neither in the agreed statement of fact filed at the first day of hearing nor the subject of evidence adduced at the hearing.

7. There is no doubt a party cannot in its final argument assert or refer to facts that have not been the subject of evidence or were not before the Board on agreement.

8. After the Board entertained the parties' submissions but before ruling on the objection, Xstrata consented to the Board receiving and considering the written submission prepared by Local 598 provided the factual allegations about which no evidence was presented or were not in the agreed statement of fact were struck.

9. Both Local 2020 and Mr. Kulyski agreed with the approach to which Xstrata consented. The Board reviewed with the parties what portions of Local 598's written submission would be struck. The parties present at the hearing agreed that two factual assertions made by Local 598 were properly before the Board as were the portions of the submissions containing argument. The Board struck the balance of the factual assertions in Local 598's submission.

Material Facts

10. The parties' agreed statement of fact was contained in the Board's decision in this matter dated September 4, 2009 but for ease of reference is attached as an appendix to the decision.

11. Xstrata maintains first aid rooms close to the entrances to its Craig Mine and Fraser Mine. The Craig Mine also has another entrance that was identified as the Onaping Mine. There is also a first aid room near the Onaping entrance to the Craig Mine the parties referred to as the Onaping First Aid Room. Because the Onaping entrance to the Craig Mine was not being used by workers to enter and leave that mine, the parties agreed section 281.1(1) required only one first aid room close to an entrance to the Craig Mine and a first aid room near the entrance to the Fraser Mine.

12. In addition to the two first aid rooms in respect of the Craig and Fraser Mines, Xstrata maintains a first aid room at its Strathcona Mill and the Onaping First Aid Room. There is also a first aid room at the Thayer Lindsley Mine, but the staffing associated with the first aid room at the Thayer Lindsley Mine is not material or relevant to the issue in this appeal. The four first aid rooms relevant to this proceeding (Craig Mine, Fraser Mine, Onaping First Aid Room and Strathcona Mill) are all within 7 kilometres of one another with two lane paved roads with a 60 kilometre per hour speed limit between all four locations.

13. Although section 281.1 establishes St. John's Ambulance Advanced First Aid certification and cardio-pulmonary resuscitation ("CPR") certification as the minimum qualifications a person must hold to be designated as the person having the charge of a first aid room, the individuals having the charge of Xstrata's first aid rooms are in fact fully trained paramedics who hold Emergency Medical Care Assistant certification. The parties agreed section 281.1(3) of the regulation does not require a first aid attendant be stationed in a first aid room. Rather, the first aid attendant responsible for a first aid room must be readily available to administer first aid and cannot be assigned to perform other work that would be likely to adversely affect that individual's availability to respond and provide first aid.

14. In February, 2009 Xstrata significantly reduced its core mining operations. The workforce at the Craig Mine went from approximately 320 individuals (employees and contractors) to about 10, while the workforce at the Fraser Mine went from approximately 600 individuals (employees and contractors) to about 45. Although core mining work stopped, work continued underground in the mines for the purpose of carrying out necessary maintenance.

15. Mr. Ayotte in his evidence discussed the nature of the maintenance work being done underground, and explained that some 10 people continued to work underground in the Craig Mine and about 14 people were working underground at the Fraser Mine.

16. The first aid attendants are assigned to perform a myriad of other duties, as set out in the job description filed as exhibit 2 in this proceeding. In essence, the first aid attendants are primarily

responsible to administer first aid should an employee or contractor on Xstrata property suffer an injury or illness, stabilize the injured or ill individual pending the arrival of emergency medical services, and inspect and audit the first aid equipment and supplies in the first aid rooms and in their emergency vehicles. In addition to their principal first aid functions, they are also responsible for carrying out patrols on the Xstrata property for purposes of security and surveillance. When on patrol, they are driving a fully outfitted emergency response vehicle with emergency lights and sirens, two-way radio and cell phone, and other necessary equipment such as a defibrillator, resuscitation and extrication equipment, trauma bag and splinting devices.

17. Prior to February 2009, Xstrata assigned two first aid attendants to have the charge of the two first aid rooms near the Fraser and Craig Mine entrances. Those two first aid attendants were also responsible for the first aid room at the Strathcona Mill. In practice, one first aid attendant was stationed at the Onaping First Aid Room to function principally as a dispatcher and the other first aid attendant carried out patrols of the area between the Onaping First Aid Room, the first aid rooms near the entrances to the Craig and Fraser Mines and the Strathcona Mill.

18. The change Xstrata sought to implement was to eliminate one of the two first aid attendants responsible for the two first aid rooms close to the Fraser and Craig Mines and the first aid room at the Strathcona Mill. The proposed change would eliminate the first aid attendant stationed in the Onaping First Aid Room. Xstrata intended to have one first aid attendant carry out the patrol function and be the person having the charge of both first aid rooms near the entrances to the Fraser and Craig Mines. In addition that first aid attendant would also remain responsible for the first aid room at the Strathcona Mill.

19. The parties in their agreed statement of fact described the procedure for dealing with an incident at the Fraser or Craig Mines requiring the attention of a first aid attendant. Any time a medical situation arises, the personnel at the mine contact the mine's Central Control Room ("CCR"). The CCR operator places a call to the Onaping First Aid Room as well as then contacting the Emergency Medical Services (fire and ambulance services) operated by the municipality. The first aid attendant at the Onaping First Aid Room contacts the first aid attendant on patrol to attend to the individual requiring first aid.

20. Mr. Siemer in his evidence described the communications systems used by Xstrata and the first aid attendants when an incident requiring first aid arises in a mine. The first aid attendants each have a hand held radio phone and a company cell phone. The patrol vehicle used by a first aid attendant contains a radio which is the base unit for the hand held radio. When a first aid attendant is required to deal with an incident in a mine, the call from the mine CCR will go to the Onaping First Aid Room. If a first aid attendant is in the Onaping First Aid Room when the call comes in, that first aid attendant would normally dispatch the first aid attendant on patrol to respond. Mr. Siemer explained that when a first aid attendant was not in the Onaping First Aid Room the telephone was call forwarded to another first aid room at the Thayer Lindsley Mine or the smelter. He said when the first aid attendant left the Onaping First Aid Room to engage in other duties, there were always two other first aid rooms staffed 24 hours a day to which the telephone would be call forwarded. When the Thayer Lindsley Mine closed, the first aid attendant was transferred to Nickel Rim so, according to Mr. Siemer, there continues to be two other Xstrata first aid rooms staffed around the clock to which calls to the Onaping First Aid Room could be forwarded.

21. I received a good deal of evidence about what might take place if two incidents requiring first aid occurred at the same time at different locations and the impact that would have on the ability of one first aid attendant to respond. I also received evidence about the possibility of the first aid attendant on patrol having a flat tire, mechanical breakdown or getting stuck in a snow bank. It was conceded by Xstrata that those situations could possibly occur. Mr. Ayotte pointed out that if only one first aid attendant were available that individual would be under tremendous pressure to deal with those sorts of situations.

22. Mr. Siemer acknowledged in cross-examination that if only one first aid attendant having the charge of two first aid rooms was responding to a call when another incident requiring first aid arose, that first aid attendant would not be available to provide first aid in respect of that second call. While conceding in those circumstances an Xstrata first aid attendant would not be able to respond to that second incident, he maintained medical attention was available through the municipal emergency medical services. He also said in redirect examination if more than one medical situation arose requiring a first aid attendant, emergency medical services would be called, and that even under the system where there were two first aid attendants having the charge of two first aid rooms, a situation might arise where both attendants would be dealing with emergencies. In that circumstance, the municipal emergency medical services would respond. I note the parties in their agreed statement of fact at paragraphs 20 and 21 referred to the other emergency medical services available to deal with situations at Xstrata requiring medical attention.

23. Mr. Ayotte in cross-examination agreed that the dispatch function previously undertaken by the first aid attendant assigned to the Onaping First Aid Room could be carried out by first aid attendants at other Xstrata facilities such as the one at the smelter or at Nickel Rim. Nevertheless, Mr. Ayotte maintained the first aid attendant in the Onaping First Aid Room would always be available and nearby to assist if a situation developed requiring two first aid attendants to deal with incidents at the Craig and Fraser Mines simultaneously. That ability to respond quickly would disappear if Xstrata were permitted to eliminate one of the two first aid attendants.

24. Mr. Siemer in his testimony explained the only difference between two first aid attendants having the charge of the two first aid rooms, and one first attendant having the charge of the two first aid rooms was that the dispatch function previously done by the first aid attendant at the Onaping First Aid Room would be carried out by the mine CCR. He said the communication protocols to deal with medical situations requiring first aid attendants to respond remained the same. He pointed out under the proposed plan the first aid attendant having the charge of the two first aid rooms would be on patrol and would be available to respond to first aid calls in the same way as before. The only thing that would change for all practical purposes is that a first aid attendant would not be in the Onaping First Aid Room as often as before. When the one first aid attendant is on patrol, the calls to the Onaping First Aid Room would be call forwarded to another first aid room staffed around the clock. That is what takes place currently when the first aid attendant who is not on patrol is not in the Onaping First Aid Room.

25. The change Xstrata seeks to implement would result, according to the parties' agreed statement of fact, in the CCR operator directly contacting the first aid attendant on patrol to go to the individual requiring first aid. It would also result in only one first aid attendant employed by Xstrata being available to deal with workers requiring urgent medical attention at both the Fraser and Craig Mines.

Submissions and Analysis

26. It is that latter fact that is the basis for the argument made by Mr. Kulyski. In essence, the Ministry of Labour and the Inspector submit because section 281.1(3)(b) of Reg. 854 requires a person who is designated to have the charge of a first aid room be "readily available" and, by reason of section 281.1(3)(c) cannot be assigned other work "of a nature that is likely to adversely affect the person's availability to administer first aid.", a first aid attendant engaged in rendering first aid at one first aid room is performing work that not only would *likely* adversely affect that attendant's availability to administer first aid at another first aid room, but would clearly render that attendant unavailable to do so. In their submission, that is sufficient for the Board to conclude the section 281.1 requires a first aid room close to a mine entrance to be in the charge of one person, and where there are two underground mines entrances requiring first aid rooms near each mine entrance, the two first aid rooms cannot be in the charge of the same person.

27. Local 598 in its written submissions makes that same argument when it states, after referring to section 281.1(3) of Reg. 854:

> The law does not differentiate whether we have one or 200 employees working there. It is also our belief that once the First Aid attendant attends to a call he can no longer be in charge of the First Aid room, therefore the reasoning why a second attendant is required.

28. Local 2020 contended the opening words of section 281.1(3) clearly contemplated a first aid room being in the charge of one person, and therefore where there are two first aid rooms, each room must be in the charge of a different person. It argues a first aid attendant must be available to render first aid and submits the regulation cannot be complied with if one individual has the charge of two different first aid rooms. Obviously, if the person is rendering first aid as a result of a situation being dealt with in one first aid room, that individual cannot be available to provide first aid should there be a need in the other first aid room.

29. It is clear section 281.1(3) of the regulation contemplates the qualified person having the charge of a first aid room can be assigned to carry out other duties. They are not required to be immediately available to respond and provide first aid where an individual is injured or becomes ill. Rather, the regulation uses the term "readily available" which suggests a first aid attendant need not remain in close proximity to the first aid room to render first aid immediately but can be elsewhere doing other things so long as the attendant can be available to render first aid within a reasonable period of time.

30. Xstrata submitted the language of section 281.1(3)(b) must be read in context with 281.1(3)(c) which, it argued, demonstrates the regulation does not require an immediate response by a first aid attendant, and moreover, expressly contemplates the first attendant engaging in other work so long as the nature of the other work is not likely to adversely affect the attendant's availability to provide first aid. It also argued the Board should interpret the meaning of the obligation imposed by section 281.1(3)(b) by having regard to other provisions in Reg. 854 requiring a person's availability and proximity. It pointed to several other sections in that regulation which are specific in relation to the availability and location of workers or equipment in a variety of other circumstances.

31. Xstrata submitted when the Lieutenant-Governor in Council required someone or something to be "immediately available" it said so explicitly. Xstrata referred to section 31 of Reg. 854 which provides:

> No worker shall build or set a fire in an underground mine unless the worker is specifically authorized to do so and has immediately available suitable fire extinguishing equipment.

In the same vein, Xstrata pointed to section 41(3) of Reg. 854 in which a requirement that individuals be assigned to one mine is made explicit. Section 41(3) provides:

> A suitable number of workers at each mine and mining plant shall be trained in the fire-fighting procedures and,
>
> (a) the names of such workers shall be posted in a conspicuous place;
> (b) such workers shall be tested for proficiency at least once a year; and
> (c) a written report of the results of the tests shall be made and kept on file.

Xstrata also referred to several other provisions in the Reg. 854 to buttress its argument that when the regulation requires individuals be assigned to specific locations, be given specific duties or be in close proximity to another person, it is quite specific. It referred to section 60(2)(b) of Reg. 854 which states:

> (b) at least one other worker, who is a competent person, equipped with a suitable alarm shall be in constant attendance outside the silo, bin, hopper or other container or structure.

and section 97(2) which provides:

> (2) When a worker is above the casting floor level of an operating blast furnace, a second competent worker shall,
>
> (a) be in attendance to render assistance to the worker; and
> (b) remain in a safe place until such assistance is required.

Xstrata also referred to section 141 of Reg. 854 as one of several examples of the regulation making clear when a worker or workers must be stationed at a particular place. Section 141(1)(a) provides:

> (1) Before blasting,
>
> (a) a worker shall be stationed at each entrance or approach and instructed to prevent inadvertent access to every place where,
> (i) the blasting is to take place,
> (ii) the safety of persons may be endangered by the blasting, or
> (iii) a diamond drill hole intersection may connect with the blast;

Xstrata also pointed to section 303(2) which requires "an adequate number of workers" be available and section 307(1)(b) which requires a worker be stationed outside and near the entrance of a confined space when another worker is to enter that confined space. Xstrata submits these provisions of the Reg. 854 demonstrate that regulation is specific about the obligation to have one person assigned to only one location. Xstrata contends the absence of specificity in section 281.1 with respect to the first aid room close to the entrance of an underground mine being in the charge of a first aid attendant assigned only to that first aid room suggests Xstrata can be in compliance with the regulation if it assigns one first aid attendant to have the charge of more than one first aid room.

32. Local 2020 urged me when determining the extent of Xstrata's obligation under section 281.1 to consider the nature of the legislation and its purpose as articulated by the Ontario Court of Appeal in *Ontario (Ministry of Labour)* v. *City of Hamilton*, (2002), 58 O.R. (3d) 37 at 43:

> The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

Local 2020 also referred to and relied on the Board's statement in *Lennox Drum Ltd.*, [2009] OLRB Rep. July/Aug. 567 (July 10, 2009) in which the Board described its approach to interpreting a regulation under the Act at page 574:

> The purpose of the Regulations are [sic] broad and remedial. They are in place to ensure the safety of workers. The structure and process itself must facilitate the health and safety of the worker. As such, non-compliance with the Regulation in this case does not meet that standard. The alternative method used is not equivalent in strength, health and safety. Lennox Drum is therefore, required to ensure that the Regulation is complied with.

Local 2020 submits the Board must apply the broad and remedial purpose of section 281.1 by interpreting it in a way that will always ensure the safety of workers.

33. Xstrata accepts the Board should interpret the Act generously "that is in keeping with the purposes and objectives of the legislative scheme", but argues determining "the purposes and objectives of the legislative scheme" requires reading the words in their entire context. Xstrata referred to the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 which adopted the approach expressed by Dreidger in *Construction of Statutes*, (2nd Ed., 1983) at page 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Supreme Court of Canada, after referring to that passage by Dreidger wrote at paragraphs 22 and 23:

> 22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".
>
> 23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

34. Xstrata submits when reading the Act and the regulations as a whole, and the context in which the words of section 281.1 are used it is apparent the Act and the regulations strive to balance the need to protect the health and safety of workers while recognizing mining is an industry that must operate efficiently. More can always be done to eliminate all risks associated with the tasks undertaken by workers in the mining industry, but Xstrata submits there are costs, both direct and indirect, associated with doing so. That balance is demonstrated in respect of the obligation to have a first aid attendant who is in charge of a first aid room "readily available" as opposed to "immediately available" and by permitting the operator of an underground mine to assign other duties to that first aid attendant provided the "nature" of those other duties is not "likely to adversely affect" that first aid attendant's "availability to administer first aid". Simply put, first aid attendants who are in charge of a first aid room need not be waiting to respond to a call. They can be engaged in other work and perform other duties they can leave when they are required to render first aid.

35. When Xstrata examined the feasibility of having the two first aid rooms in the charge of the same individual, it had undertaken a review of its first aid procedures throughout all of its operations in Sudbury. In response to questions in cross-examination by both Local 598 and Local 2020, Mr. Siemer explained Xstrata had undertaken a risk assessment of the change to its staffing of the two first aid rooms in issue. Mr. Siemer conceded neither Local 598 nor Local 2020 were formally involved in carrying out that risk assessment, but there had been participation by two first aid attendants, production and maintenance staff, and safety representatives. Mr. Siemer testified the group convened to carry out the risk assessment were knowledgeable about first aid requirements at its mines. The discussion focussed on the impact the proposed change would have on first aid attendants being readily available in the case of an injury. Mr. Siemer testified a document had been prepared with the results of the risk assessment but he could not recall whether that document had been provided to Local 598 or Local 2020.

36. It seems to me the crux of the issue is whether, in the circumstances existing at the time the Order was issued, a first aid attendant having the charge of two first aid rooms is "readily available" and the other work he or she performs is "not likely to adversely affect" that person's availability to administer first aid at or near one of the first aid rooms when that first aid attendant is engaged in providing first aid at or near the other first aid room. In making that assessment it is, in my view, necessary to consider not just the possibility of simultaneous incidents taking place requiring the presence of the first aid attendant at two different locations at the same time, but

whether that situation is "likely" to occur, and if so, would it "likely adversely affect" that attendant's availability to administer first aid.

37. Xstrata submits the phrase "likely to adversely affect" the attendant's ability to be "readily available" requires more than a mere possibility. It must be more probable than not that the attendant's duties would "likely" have a negative impact on the attendant's availability.

38. Local 2020, Local 598, Mr. Kulyski and the Ministry of Labour all base their argument on a first aid attendant having the charge of two first aid rooms not being able to administer first aid at one first aid room (or at the mine to which that first aid room is near) when that attendant is engaged in administering first aid at the other first aid room (or at the other mine). While that situation is possible, it is, in my view, far less likely to occur when the two mines in issue are not in production and when the work force in each mine has been reduced from 320 to approximately 10 working underground at the Craig Mine and from 600 to approximately 14 working underground at the Fraser Mine.

39. In that regard, I observe the first aid attendants assigned to the Craig Mine and the Fraser Mine first aid rooms are also responsible for the first aid room at the Strathcona Mill. There was no suggestion a first aid attendant engaged in rendering first aid at the Strathcona Mill cannot still be considered in charge of one of the two first aid rooms at the two underground mines in issue.

40. Xstrata submitted the decision in *Sudbury Mine Mill & Smelter Workers' Union, Local 598*, unreported, Office of Adjudication, decision dated May 12, 1994, Q.L. cite [1994] OOHSAD No. 18 supported its argument. That matter was an appeal under the Act in which the issue was whether supervisors working underground were "readily available" to provide first aid as required by section 281.1 of Reg. 854. In dismissing the appeal, the adjudicator held at paragraph 10:

> … it is clear that this case really turns on the meaning of the words "readily available", appearing in the Regulation. These words are not defined anywhere in the Act or regulations: that fact and the general vagueness of the phrase itself not surprisingly has caused some uncertainty with respect to the parties' rights and obligations in the important area of first aid. In attempting to interpret these words, I must consider what does appear in the Regulation, as well as what does not. Subsection (3) of the cited section essentially states that a first aid room shall be in the charge of a person who is properly certified, readily available and not performing work of a nature that is likely to adversely affect his or her availability to administer first aid. No specific response time is set out, nor is any explanation or definition provided as a guideline, as is the case in several other areas of the regulations. I can only conclude that given the general nature of the words used, the facts and circumstances of each case must be looked at, keeping in mind that the adverb "readily" appears, as opposed to "immediately" or any more specific modifier.

41. Local 2020 relies on the approach taken by the Board in *Falconbridge Ltd.*, unreported, Board File No. 1824-02-HS, decision dated October 2, 2002, Q.L. cite [2002] OOHSAD No. 120 in which the Board dismissed an application under the Act to suspend an inspector's order requiring Falconbridge to employ two persons at the two first aid rooms at the entrances to two mines (the

Craig and Fraser Mines) on the weekend and night shifts pending the disposition of the applicant's appeal. The Board at paragraphs 9 and 10 wrote:

> 9. The Regulation requires that there be a first aid room near the entrance (as there is here) and that the room shall be in the charge of a person who has certain qualifications and who is (a) readily available and (b) who does not perform other work of a nature that is likely to adversely affect the person's ability to administer first aid. The difficulty in this case is the possibility that there might be two employees requiring first aid in each of the rooms simultaneously. One person could not be in two places at once. The worker would therefore not be readily available, and in the performance of duties at one room, would be unavailable in the second room. The likelihood of simultaneous first aid requirements is not an assessment that the Regulation permits. It requires a first aid room at the entrance of both mines. It requires that a person be in charge of each room. By definition, one person cannot be readily available in both places simultaneously.
>
> 10. The Regulation is itself a kind of balance. It does not require an employer to provide sufficient numbers of first aid workers to be available at each room to deal with multiple injuries from the same mine. It does not permit any lower level of staffing than the one person who is always "readily available". Assuming without deciding that the particular circumstance of this site presents a special case, that is not something the Regulation contemplates. The rule is without exceptions.

The Board's analysis set out in paragraph 9 is in essence the approach all the responding parties urged me to adopt and conclude the appeal should be dismissed.

42. The Board's decision in *Falconbridge Ltd.* was a suspension request that was determined on the basis of written submissions without the benefit of full argument on the issue. The Board in that case referred to the earlier decision in *Sudbury Mine Mill & Smelter Workers' Union, Local 598* but said it was not convinced by the reasoning in that decision.

43. The Board when dealing with a suspension request does not purport to come to a conclusive determination on the merits of an appeal. The test applied by the Board is whether there is a "strong *prima facie*" case together with whether suspending the order would adversely affect the safety of workers and whether refusing to suspend the order imposes a significant hardship on an applicant.

44. I respectfully disagree with the Board's conclusion at paragraph 9 of the *Falconbridge Ltd.* when it wrote: "The likelihood of simultaneous first aid requirements is not an assessment that the Regulation permits." While the Board correctly pointed out at paragraph 10 the regulation contains a balance, it held the balance exists because the regulation does not require more than one first aid attendant having charge of a first aid room even if there could be many injuries that have to be dealt with at the same time at the same mine. It seems to me the balance in the regulation relates to whether it is the first aid attendant's other duties, whether at another first aid room or elsewhere "are likely to adversely affect" his or her "availability to render first aid." Unlike the Board in *Falconbridge Ltd.*, I am of the opinion that assessing "the likelihood of simultaneous first aid requirements" is an assessment the regulation does contemplate the Board engaging in when it

determines whether a first aid attendant's other work is "of a nature that is likely to adversely affect" that attendant's availability to administer first aid.

Conclusions

45. Section 281.1 requires a first aid room "be in the charge of a person" with certain qualifications. Reading the section in its entirety, having a first aid room "in the charge of" a person means that a specific individual is responsible for or has control over that room and is available to render first aid should the need arise. The regulation requires the first aid attendant be "readily available". It does not require the first aid attendant be *immediately* available. There is, in my opinion, nothing in section 281.1 of the regulation precluding an employer from having two first aid rooms associated with two underground mines "in the charge of" the same individual when it is unlikely, having regard to all the circumstances, including the nature of work taking place in the mines and the number of individuals working underground, that first aid attendant will be required to administer first aid at the same time in two different locations.

46. Where an underground mine is in full operation and there are several hundred workers engaged in active mining work, section 281.1 of the regulation requires only one first aid attendant be "readily available" to administer first aid at that mine. Where as here, the two mines in issue are relatively close to one another (the distance between the Fraser Mine and Craig Mine first aid rooms is approximately 4.5 kilometres), both mines are not in production and only a small number of individuals work underground to maintain the mine it is, in my view, far less likely that the first aid attendant will be required to administer first aid at the first aid rooms at both mines simultaneously when compared to the likelihood one first aid attendant might be required to administer first aid to two or more persons simultaneously in one mine when the mine is in production and several hundred miners are working underground. In that latter situation, I would have no doubt in concluding the nature of a first aid attendant's work in one first aid room would likely adversely affect that first aid attendant's availability to administer first aid in another first aid room.

47. While I disagree with the Board's analysis of section 281.1 of the regulation in *Falconbridge Ltd.* I agree with the Board's decision dismissing the application for suspension of the order. I note in that regard the Board found that during the day shift, when two first aid attendants were assigned to the two first aid rooms in issue, there were 600 employees at work. The population on the night shift was 246 and on the weekend shift was 293. The number of workers at those mines was far greater than the number of individuals at work at the two mines in issue before me when the Order was issued.

48. After the Board dismissed the application for suspension of the order in *Falconbridge Ltd.*, Falconbridge Ltd. advised the Board it was withdrawing the appeal, and the Board, by decision dated October 31, 2002 (Board File No. 1823-02-HS) noted the appeal had been withdrawn. Thus, the Board in that case did not determine the issue that is before me in this proceeding.

49. I am satisfied section 281.1(3) of Reg. 854, when read in context and in light of the broad and remedial nature of the Act as a whole, balances the obligation to ensure a first aid room close to the entrance of an underground mine is in the charge of a qualified first aid attendant who is readily available to administer first aid with the need for an underground mine operator to maintain a reasonable staffing complement. There is nothing explicit in section 281.1(3) that requires a first aid attendant to have the charge of only one first aid room at an underground mine where the

circumstances indicate it is reasonable for that first aid attendant to have the charge of two first aid rooms near the entrances to two underground mines relatively close to one another because it is unlikely that first aid attendant would be required to administer first aid simultaneously at both mines. That is, a first aid attendant who is in charge of two first aid rooms adjacent to the entrances to two underground mines relatively close together is not engaged in work of a nature that is likely to adversely affect that attendant's availability to administer first aid when those mines are not in production and only a small number of individuals are performing mine maintenance underground. In my view, having regard to the purposes of the Act and the regulation, and giving the words of that section their plain and ordinary meaning when read in light of the other provisions of Reg. 854, one first aid attendant may be assigned to be in charge of both the first aid rooms near the entrances to the Craig and Fraser mines because those mines are not in production and there are relatively few workers engaged in underground work.

50. In the result, I have been persuaded the proposed assignment by Xstrata of having the first aid rooms close to the respective entrances to the Craig Mine and the Fraser Mine in the charge of the same qualified first aid attendant accords with section 281.1(3) of Reg. 854 while those mines remain out of production.

51. Therefore, for the reasons set out above, the Board allows the appeal and pursuant to section 61(4) of the Act hereby rescinds the Order.

APPENDIX

AGREED STATEMENT OF FACTS

Xstrata Canada Corp. ("Xstrata"), United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union, Local 2020 ("the Union"), and the Ministry of Labour agree that the following facts are true and accurate for the purpose of the appeal before the Ontario Labour Relations Board filed by Xstrata on May 15, 2009 (File No. 0506-09-HS) (the "Appeal"):

Background

1. Xstrata is a company engaged in the exploration, development, mining, processing, and marketing of metals and minerals. Xstrata is headquartered in Toronto, Ontario.

2. Xstrata's operations include a mill ("the Strathcona Mill"), smelter, and four underground nickel/copper mines located in the City of Greater Sudbury (collectively, "the Sudbury Operations").

3. The three underground nickel/copper mines at the Sudbury Operations relevant to this appeal are the Craig Mine, Fraser Mine, and Thayer Lindsley Mine (collectively "the Mines").

4. The Union is the exclusive bargaining agent for a bargaining unit of office, clerical and technical employees of Xstrata at the Sudbury Operations. Xstrata and the Union are parties to a collective agreement effective from February 28, 2007 to February 27, 2010.

5. Rick Kulyski ("Inspector Kulyski") is a Mining Health and Safety Inspector for the Ontario Ministry of Labour, based out of Sudbury, Ontario.

Xstrata's Sudbury Mining Operations

6. In February 2009, Xstrata underwent an internal reorganization (the "Reorganization") pursuant to a shareholder and court approved plan of arrangement, which resulted in an immediate cessation of Core Mining Activities (as defined below) at the Mines and the permanent lay off of hundreds of Xstrata employees.

(a) Operations Prior to the Reorganization

7. Prior to the Reorganization, Xstrata maintained a workforce of over 1200 employees and contractors at the Sudbury Operations, including approximately 320 employees and contractors working out of the Craig Mine, approximately 600 employees and contractors working out of the Fraser Mine, approximately 125 employees working out of the Thayer Lindsley Mine.

8. During this time, the Mines were operational, running twenty-four hours a day, seven days a week, and milling an average of 1.9 million tonnes of high-grade nickel-copper ore annually.

9. The activities that the vast majority of employees were engaged in at the Mines prior to the Reorganization included the drilling, blasting, mucking, hoisting, and below-ground rail haulage of ore and waste rock (collectively, "Core Mining Activities").

(b) Operations Following the Reorganization

10. Following the Reorganization in February 2009, Xstrata ceased all Core Mining Activities at the Mines.

11. As a result of the cessation of core mining activities at the Mines, Xstrata reduced its workforce at the Mines as follows: the workforce was reduced at the Craig Mine from approximately 320 employees and contractors to approximately 6-10 employees, at the Fraser Mine from approximately 600 employees and contractors to approximately 45 employees (approximately 14 of whom work underground), at the Thayer Lindsley Mine from approximately 125 employees to approximately 6 employees.

12. The remaining employees employed by Xstrata at the Mines currently work an eight-hour daytime shift from Monday to Friday.

13. The employment-related activities that continue at the Mines include basic statutory "care and maintenance" standards, including:

- monitoring mine shaft water elevations;
- upgrading and reconditioning (at Fraser Mine only);
- maintaining ventilation and dewatering systems; and
- fulfilling other maintenance duties prescribed by the *Occupational Health and Safety Act, 1990*.

First Aid Rooms at the Mines

14. Xstrata equips and maintains First Aid Rooms close to the entrance of the Craig Mine, Fraser Mine, the Strathcona Mill and Thayer Lindsley Mine ("the Craig, Fraser, Mill and Thayer Lindsley First Aid Rooms").

15. The Craig, Fraser, Mill and Thayer Lindsley First Aid Rooms are equipped and maintained in accordance with section 281.1(1) and (2) of Ontario Regulation 854 of the *Occupational Health and Safety Act, 1990* ("O. Reg. 854"). The First Aid Room at the Strathcona Mill is equipped and maintained in a manner consistent with O. Reg. 854.

16. In addition, Xstrata also equips and maintains a fourth central First Aid Room ("the Onaping First Aid Room").

17. The Onaping First Aid Room is also equipped and maintained in accordance with section 281.1(2) of O. Reg. 854.

18. The Onaping First Aid Room is connected to the Craig Mine and Fraser Mine by a two-lane paved roadway. The speed limit on the vast majority of the roadway is 60 kilometres per hour.

19. The approximate distances between the Craig, Fraser, Mill and Thayer Lindsley First Aid Rooms are as follows:

- Onaping First Aid Room to Craig First Aid Room – 1 kilometre.
- Onaping First Aid Room to Fraser First Aid Room – 5.5 kilometres.
- Fraser First Aid Room to Craig First Aid Room – 4.5 kilometres.
- Strathcona First Aid Room to Fraser First Aid Room – 1 kilometre.
- Strathcona First Aid Room to Craig First Aid Room – 6 kilometres.
- Strathcona First Aid Room to Onaping First Aid Room – 7 kilometres.

20. The Sudbury Operations are serviced by a nearby emergency medical services facility, which provides 24-hour fire and ambulance service. The facility is located in Levack Township, approximately 5 kilometres west of the Craig Mine. There is one Paramedic Response Unit (PRU) available for day shift and one for night shift. The PRU is a single responder and cannot transport patients. If there is a call in the outlying areas, the PRU must leave his post in Levack and go on standby in Dowling, which is approximately 11 kilometres from the Craig Mine.

21. Xstrata has also entered into an agreement with Vale Inco, in which Xstrata is entitled to use a heli-pad located at Vale Inco's Levack Mine, approximately 2 kilometres north of the Craig Mine, for the purpose of emergency air evacuation services.

Attendants at Xstrata's Sudbury Mines

22. Xstrata assigns three First Aid/Security Attendants ("Attendants") to the Mines, each of whom is a member of the bargaining unit represented by the Union.

23. Each of the Attendants is a certified, fully-trained paramedic. They have each obtained their Emergency Medical Care Assistant (EMCA) certification and have received specialized emergency training from Xstrata. The Attendants at Xstrata therefore meet and, in fact, far exceed the certification requirements prescribed by section 281.1(3)(a) of O. Reg. 854.

24. The primary job duties and responsibilities of the Attendants include:

- administering first aid treatment in the event of an injury and/or illness to the employees and contractors working on the property, at the Mines, and the Strathcona Mill;
- stabilizing injured and/or ill employees prior to the arrival of Emergency Medical Services;
- and inspecting and auditing first aid equipment and supplies in first aid rooms and emergency vehicles.

25. The Attendants also have job duties and responsibilities relating to providing security and surveillance duties, including patrolling the property and related traffic enforcement activities.

26. The Attendants are equipped with critical first response equipment and two-way radio communication devices, which enable them to receive immediate notification in the event of a medical emergency in one of the Mines.

27. The Attendants are assigned to, and responsible for, the first aid rooms as follows:

- one Attendant is assigned to, and responsible for, the Thayer Lindsley First Aid Room; and
- two Attendants are jointly assigned to, and responsible for, the Onaping First Aid Room, Craig First Aid Room, Fraser First Aid Room, and the Strathcona Mill ("the Craig/Fraser Attendants").

28. During a typical shift, one of the Craig/Fraser Attendants is stationed at the Onaping First Aid Room, where he serves primarily as a dispatcher.

29. The other Craig/Fraser Attendant is assigned to patrol the area between the Onaping First Aid Room, Craig First Aid Room, Fraser First Aid Room and Strathcona Mill. The Craig/Fraser Attendants also patrol the tailings area, Onaping town site, diamond drill site locations, and other remote off-road areas.

30. The Craig/Fraser Attendant conducts his patrol in a 2007 Chevrolet Tahoe emergency response vehicle. The vehicle is fully outfitted with emergency lights and sirens, two-way radio and cellular telephone technology, and critical first response equipment, including a defibrillator, "trauma bag", oxygen equipment, splinting devices, and extrication equipment.

31. In the event that a medical emergency occurs at either of the Craig or Fraser Mines, an emergency telephone call is made from the mine to the Central Control Room (CCR), located near the surface entrance to the mine.

32. The CCR operator who receives the call will then place an emergency call to the Craig/Fraser Attendant in the Onaping First Aid Room. The CCR operator will also contact Emergency Medical Services.

33. In the event that an Attendant is called to respond to an emergency medical situation, they are obliged to cease all other duties and to respond immediately.

34. The Craig/Fraser Attendant stationed in the Onaping First Aid Room will then dispatch the Craig/Fraser Attendant on patrol, who will then immediately travel to the mine entrance in order to attend to the injured worker.

35. The approximate minimum travel time from the entrance to the furthest underground point of either the Craig Mine and Fraser Mine for an Attendant responding to a medical emergency is as follows:

- Entrance to the Craig Mine to the furthest underground point (i.e. 59 Sublevel) in the Craig Mine – approximately 50 minutes in ideal conditions.
- Entrance to the Fraser Mine to furthest underground point (i.e. 34-0 Sublevel) in the Fraser Mine – approximately 50 minutes in ideal conditions.

36. The travel time described in paragraph 35 may be significantly increased if there are any activities in the mine affecting the transportation of workers in and out of the mine, such as the movement of heavy equipment up and down the mine shaft.

37. Due to the travel times described in paragraph 35 above, the Attendant on patrol arrives at the mine entrance in advance of the injured employee reaching the surface of the mine the vast majority of the time.

Xstrata's Decision to Maintain One Attendant For the Craig and Fraser First Aid Rooms

38. Following the Reorganization and the cessation of Core Mining Activities at the Mines, Xstrata assessed the circumstances and made a decision to reduce the number of Attendants assigned to, and responsible for, the Craig, Fraser and Thayer Lindsley Mines, and the Strathcona Mill from three to two.

39. As a result of this decision, if implemented, the Attendants would be assigned to, and responsible for, the First Aid Rooms as follows:

- one Attendant will be assigned to, and responsible for, the Thayer Lindlsey First Aid Room, and
- one Attendant will be assigned to, and responsible for, the Craig First Aid Room, the Fraser First Aid Room and the Strathcona Mill (i.e. "the Craig/Fraser Attendant").

40. The primary effect of the decision would be the elimination of the Craig/Fraser Attendant stationed at the Onaping First Aid Room, who has traditionally been responsible for dispatch. The remaining Craig/FraserAttendant would therefore be primarily responsible for patrolling the area between the Onaping First Aid Room, Craig First Aid Room, Fraser First Aid Room and Strathcona Mill.

41. Because there would no longer be a Craig/Fraser Attendant stationed at the Onaping First Aid Room, CCR would now directly notify the Craig/Fraser Attendant on patrol in the event of a medical emergency at the Craig or Fraser Mines.

The Inspector's Order

42. On or about the first week of April 2009, following the Reorganization and the cessation of mining operations at the Mines, Xstrata notified the Ministry of Labour of its proposal to assign one Attendant to the First Aid Rooms at the Craig and Fraser Mines.

Inspector Kulyski issued an Order (FV No. 5260953) ("the Order") which Xstrata is now challenging in this appeal. In the Order, Inspector Kulyski directed that Xstrata "*maintain two Attendants at Xstrata's Onaping west end, one for each of its underground mines*".

COURT PROCEEDINGS

0116-06-R (Court File No. 332/09) Rainbow Concrete Industries Ltd. -and- International Union of Operating Engineers, Local 793, and OLRB

Bargaining unit – Certification – Employee – Judicial Review – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

Superior Court of Justice (Divisional Court), McCombs, Lederman and Molloy JJ., February 2, 2010

THE COURT:

NATURE OF PROCEEDING

[1] The applicant, Rainbow Concrete Industries Inc. ("Rainbow"), seeks judicial review of two decisions of the Ontario Labour Relations Board ("OLRB" or "Board") dated June 29, 2006 and March 30, 2009 to exclude certain employees from the bargaining unit:

a) The 2006 decision held that 11 drivers were not in the bargaining unit because they did not have the greatest attachment to the Sudbury location;

b) The 2009 decision held that 15 employees in question fell within the office and clerical exclusion from the bargaining unit.

[2] As a result, the ballots of these individuals were not counted. Local 793 won the representation vote and certification was issued.

[3] The applicant also seeks judicial review of the Board's decisions denying its requests for reconsideration.

BACKGROUND

[4] Rainbow is a producer and supplier of concrete products with its head office at the Sudbury Location. On April 12, 2006, Local 793 filed a certification application for a bargaining unit of all Rainbow employees working in, at, and out of the Sudbury Location except office and clerical staff, sales staff, students, non-working forepersons, and persons above the rank of non-working forepersons.

[5] On April 13, 2006, Rainbow filed a response in which it agreed with the description of the proposed unit but disagreed with Local 793's estimate of the number of individuals in the unit. It challenged the status of two groups of employees that the union asserted were not in the unit:

a) 11 drivers who the union said were not working "in, at, and out of" the Sudbury Location;

b) 17 employees who the union said fell within the office and clerical exclusion or were otherwise excluded from the unit.

[6] Meanwhile, the Board ordered a representation vote and directed that the ballots be sealed pending determination of the status disputes.

The 2006 Drivers Decision

[7] In its decision dated June 29, 2006, the Board applied the "greatest attachment" test to find that the 11 drivers were not working in, at, or out of the Sudbury location. Accordingly, they were not employees within the unit and were not eligible to vote.

[8] On July 24, 2006, Rainbow requested reconsideration of this decision on the basis that, *inter alia*, the Board had failed to appreciate the centralized nature of Rainbow's operations, had misapplied the greatest attachment test and had unreasonably restricted the concept of "in, at and out of". On August 28, 2006, the Board denied the request.

The 2009 Disputed Individuals Decision

[9] In its March 20, 2009 decision, the Board found that, of the 17 employees at issue, 15 were not in the bargaining unit and two were in the unit. Based on these findings and those in the 2006 decision, the Board determined that the unit consisted of 74 individuals. The Board had previously counted the ballots for 72 of these individuals; 40 of them were marked in favour of Local 793. This meant that Local 793 had a majority of the votes for certification, which was granted in the same decision.

[10] Rainbow filed a request for reconsideration on April 29, 2009. The Board denied the request in a decision dated May 15. On June 10, the Board made a minor amendment to that decision.

STANDARD OF REVIEW

[11] The parties are in agreement that the impugned Board decisions are reviewable on a standard of reasonableness. We agree. Existing jurisprudence has held that the standard of reasonableness applies to Board decisions on issues related to union certification. (See *Maystar General Contractors Inc., v. International Union of Painters and Allied Trades, Local 1819*, 2008 ONCA 265 (CanLII); *Schuit Plastering & Stucco Inc v. Ontario* (*Labour Relations Board*, [2009] O.J. No.2082 (Div. Ct.)).

[12] The question becomes whether the Board's decisions fall within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.

RAINBOW'S POSITION

[13] Rainbow submits that the Board's 2006 decision that the drivers were not working "in, at, or out of" the Sudbury Location was unreasonable. It argues that although the Board appropriately used the "greatest attachment" test, it failed to consider all relevant factors in determining whether the drivers in fact had the "greatest attachment" to the Sudbury location.

[14] In particular, Rainbow argued that the Board only considered where the individual normally works, and failed to take into account other relevant factors such as the fact that the scheduling and dispatch functions were centrally administered from the Sudbury location.

[15] Thus, Rainbow submits that the Board decision was unreasonable because the Board ignored the evidence that demonstrated an integrated, interdependent and functionally coherent workplace that was operated centrally out of the Sudbury location.

[16] Rainbow also submits that the Board's 2009 decision that the disputed individuals fit within the office and clerical exception was unreasonable. It argues:

> a) Whether an individual's duties and responsibilities are integral to and supported the work done by the bargaining unit is a critical factor in determining whether he/she fits within the office and clerical exception;
> b) The Board failed to appreciate or consider Rainbow's centralized, interdependent and coherent structure. Functional interdependence militates in favour of including the disputed individuals in the bargaining unit;
> c) Most of the duties and responsibilities of the disputed individuals were not clerical or administrative in nature. They supported the production component of Rainbow's business and the work done by the bargaining unit.

[17] Rainbow also submitted in its factum that it was unreasonable for the Board to draw an adverse inference from Rainbow's failure to call as witnesses Lucien Giroux and Andy Gallant. However, it did not raise this issue in argument before us.

ANALYSIS

The 2006 Decision

[18] With respect to the Board's 2006 decision that the drivers were not employed "in, at or out of" the Sudbury location, the Board applied its long established test, namely: to which location do the employees have the greatest attachment?

[19] The greatest attachment test is used where an employer has multiple locations with employees working at some or all of them.

[20] The Board found on the evidence that the drivers did not begin or end their day at the Sudbury location. The drivers certainly had no physical attachment to the Sudbury location.

[21] In this case, Rainbow agreed to a bargaining unit that was limited in geographical scope ie. employees essentially based at the Sudbury location. Accordingly, factors of integration and interdependence are not relevant. Those may be relevant considerations if there was an issue of what constitutes the appropriate bargaining unit and Rainbow was arguing that employees in remote locations should be included. But here, the parties agreed to the geographical limitation of employed "in, at, and out of" the Sudbury location. Rainbow should not now be allowed to resile from the bargaining unit description it agreed to.

[22] In the circumstances, it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location.

[23] In this case, the Board applied its jurisprudential test of greatest attachment and took into account the factors relevant to the circumstances. Its decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference. It was therefore reasonable.

The 2009 Decision

[24] With respect to the Board's 2009 decision that the disputed individuals fit within the office and clerical exception, the Board examined the functions of each disputed employee and determined that they were administrative in nature.

[25] It recognized that, to some degree, they supported the production functions. However, the Board found that their interactions with production employees were limited to providing administrative support.

[26] The Board found that the true character of their work was more like office and clerical employees than production employees. In reaching this conclusion the Board pointed to factors such as the fact that the disputed individuals primarily interacted with customers, suppliers, consultants and other administrative employees; they generally worked out of the separate administrative building rather than in the production area; the majority of their work was in the nature of paperwork.

[27] On the analysis of the evidence of the employees' duties and responsibilities, the Board concluded that the work of these employees was administrative in nature and thus fell within the

office and clerical exception. Given its experience in assessing such matters the Board's decision is entitled to deference and was reasonable.

CONCLUSION

[28] For these reasons, we are of the view that the Board's decisions were reasonable. Accordingly, the application for judicial review is dismissed.

[29] Counsel agreed that costs of the application be fixed at $5,000. Having been successful, the respondent union will therefore have its costs of $5,000 payable by the applicant. The Board sought no costs.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 2009

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0786-08-R: Construction Workers Union Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1059 (Interveners)

Unit: "All journeyman and apprentice carpenters and all construction labourers in the employ of Looby Construction Limited in all sectors of the construction industry in the United Counties of Stormont, Dundas, and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and those above the rank of non-working forepersons." (7 employees in unit)

0951-08-R: Construction Workers Union Local 52 affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council on its own Behalf and on Behalf of its Affiliated Local Unions, Labourers' International Union of North America, Local 1059 (Interveners)

Unit: "All carpenters, formsetters, equipment operators, helpers and apprentices of any of the above, truck drivers, construction labourers, and other construction employees in the employ of Looby Construction Limited in all sectors of the construction industry in the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons and office and clerical staff." (14 employees in unit)

1089-08-R: Construction Workers Union Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council on its own Behalf and on Behalf of its Affiliated Local Unions (Intervener)

Unit: "All construction labourers, carpenters and carpenter apprentices in the employ of Looby Construction Limited in all sectors of the construction industry in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons." (3 employees in unit)

1784-08-R: Construction Workers Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener)

Unit: "All construction labourers, carpenters and carpenter apprentices in the employ of Looby Construction Limited in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons." (2 employees in unit)

2781-08-R: Construction Workers Local 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Local 1059, Labourers' International Union of North America, Ontario Provincial District Council (Interveners)

Unit: "All construction labourers, carpenters, formsetters, equipment operators, helpers and apprentices of any of the above, in the employ of Looby Construction Limited in all sectors of the construction industry in Armour Township and the adjacent townships, that is, Strong Township, Joly Township, Kearney Township, Perry Township, McMurrich/Monteith Township, Ryerson Township and the Municipality of Magnetawan, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons." (6 employees in unit)

0590-09-R: Construction Workers Local 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1059 (Interveners)

Unit: "All construction labourers, carpenters and carpenters' apprentices, and employees engaged in the operation of cranes, shovels, bulldozers, or similar equipment, and those primarily engaged in the repairing or maintaining of same, employees engaged as surveyors, in the employ of Looby Construction Limited in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons." (7 employees in unit)

0689-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Middlesex Installations Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Middlesex Installations Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Middlesex Installations Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) *(Clarity Note)*

1534-09-R: Construction Workers Union Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener)

Unit: "All construction employees, that is, all construction labourers in the employ of Looby Construction Limited in all sectors of the construction industry in Casey Township and in Brethour Township and in the adjacent townships, that is, Harley Township, Ingram Township, Pense Township, Hams Township and the city of Temiskaming Shores which is the amalgamation of the town of New Liskeard, the town of Haileybury and Dymond Township, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons." (9 employees in unit)

1863-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1666671 Ontario Ltd. c.o.b. Lunga Construction (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 1666671 Ontario Ltd. c.o.b. Lunga Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of 1666671 Ontario Ltd. c.o.b. Lunga Construction in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2193-09-R: United Food and Commercial Workers International Union, (UFCW Canada) (Applicant) v. Saydat Hospitality Inc. o/a Comfort Inn Welland (Respondent)

Unit: "all employees employed by Saydat Hospitality Inc. o/a Comfort Inn Welland located in the City of Welland, 870 Niagara St, save and except supervisors and those above the rank of supervisor" (17 employees in unit)

2480-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Mansions of Forest Glen Inc. (Respondent)

Unit: "all construction labourers in the employ of Mansions of Forest Glen Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2517-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Sevenson Environmental Services Inc. (Respondent)

Unit: "all construction labourers in the employ of Sevenson Environmental Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Sevenson Environmental Services Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2525-09-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sevenson Environmental Services Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Sevenson Environmental Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Sevenson Environmental Services Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2643-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Long Valley Forming Limited (Respondent) v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Intervener)

Unit: "all carpenters and carpenters' apprentices, rodmen and rodmen apprentices, construction labourers, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing or maintaining of same and employees engaged as surveyors in the employ of Long Valley Forming Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2645-09-R: Construction Workers, Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Waltec Electrical Services Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen, and linemen apprentices all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Waltec Electrical Services Ltd., in all sectors of the construction industry in the County of Grey" (4 employees in unit)

2710-09-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Tradeworks Interiors Canada Corp. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Tradeworks Interiors Canada Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Tradeworks Interiors Canada Corp. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (2 employees in unit)

2718-09-R: Construction Workers, Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Waltec Electrical Services Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Waltec Electrical Services Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2755-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Empire Concrete Forming Ltd. (Respondent)

Unit: "all construction labourers, carpenters and carpenters' apprentices in the employ of Empire Concrete Forming Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2807-09-R: International Union of Operating Engineers, Local 793 (Applicant) v. Main Line Construction and/or, EMCO Disposal Services Ltd. (Respondents)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repair and maintaining of same and employees engaged as surveyors in the employ of Main Line Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors in the employ of Main Line Construction in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2859-09-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Belair Plumbing & Mechanical Inc. (Respondent)

Unit: "all plumbers and plumbers' apprentices and all pipefitters and pipefitters' apprentices in the employ of Belair Plumbing & Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices and all pipefitters and pipefitters' apprentices in the employ of Belair Plumbing & Mechanical Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of

Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (7 employees in unit)

2867-09-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 1046627 Ontario Limited c.o.b. as Coram Construction Group (Respondent)

Unit: "all construction labourers in the employ of 1046627 Ontario Limited c.o.b. as Coram Construction Group in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2152-09-R: United Food and Commercial Workers Union, Local 1977 (Applicant) v. OD International, Inc., o/a Office Depot (Respondent)

Unit: "all employees of OD International, Inc., o/a Office Depot in the City of Waterloo, save and except Assistant Store Manager and persons above the rank of Assistant Store Manager" (17 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	3

2184-09-R: Ontario Public Service Employees Union (Applicant) v. Bruce Peninsula Association for Community Living (Respondent)

Unit: "all employees of Bruce Peninsula Association for Community Living in Bruce and Grey Counties save and except supervisors and persons above the rank of supervisor and office and clerical staff" (64 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	7

2345-09-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 129 (Applicant) v. Hamilton Entertainment and Convention Facilities Inc. (Respondent)

Unit: "all hair and makeup employees of the Responding Party in the City of Hamilton save and except Event Supervisor and persons above that rank" (2 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2360-09-R: Syndicat des employé-es de bureau Le Droit - CSN (Applicant) v. LEDROIT (Division of 3834310 Canada Inc.) (Respondent) v. Section Locale 145 du syndicat canadien des communications de l'énergie et du papier (Section locale 145 SCEP) (FTC-CTC) (Intervener)

Unit: "all employees of LEDROIT, a division of 3834310 Canada Inc. in the Province of Ontario, save and except assistant department manager, assistant pay clerks, assistant personnel director, secretary to the personnel director, secretary to the general manager, the executive secretary to the director of the commercial printing department, persons above the rank of assistant department manager, assistant pay clerk and assistant personnel director, salesmen and those persons covered by another certificate" (46 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2382-09-R: Teamsters Local Union No. 419 (Applicant) v. Versacold Logistics Canada Inc. (Respondent)

Unit: "all of the employees of Versacold Logistics Canada Inc. employed as Customer Service Respresentatives on the Order Desk, in the City of Brampton, save and except supervisors, persons above the rank of Supervisor, office, clerical and sales staff and those employees covered under a subsisting Collective Agreement" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2391-09-R: Ontario Public Service Employees Union (Applicant) v. Sodexo Canada Ltd. (Respondent)

Unit: "all employees of Sodexo Canada Ltd. engaged in cleaning services at St. Lawrence College in the City of Kingston, save and except supervisors and persons above the rank of supervisors" (27 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	3

2393-09-R: Ontario Nurses' Association (Applicant) v. Specialty Care Cedarvale Lodge (Respondent)

Unit: "all Registered Nurses and Nurses with a temporary certificate of registration employed in a nursing capacity at Specialty Care Cedarvale Lodge save and except the Director of Care and persons above the rank of Director of Care" (11 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2402-09-R: Workers United Ontario Council (Applicant) v. Coppley Corp. (Respondent) v. UNITE HERE (Intervener)

Unit: "all the employees of the employer save and except supervisor, persons above the rank of supervisors, head engineer and operating engineers, head mechanic and clothing mechanic, salaried designers and designers in training, office staff and sales staff" (289 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	307
Number of persons who cast ballots	280
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	274

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	265
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	0

2405-09-R: Hamilton Ontario Water Employees Association (Applicant) v. City of Hamilton (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener)

Unit: "all employees who are employed by the City of Hamilton at the Facilities, save and except Excluded Employees" (46 employees in unit)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

2438-09-R: Canadian Union of Public Employees (Applicant) v. Joseph Brant Memorial Hospital (Respondent)

Unit: "all employees of the Joseph Brant Memorial Hospital at Burlington, Ontario regularly employed less than full-time hours (.5 on a weekly basis, or in other words, less than 37.5 hours on a bi-weekly basis) save and except supervisors, and persons above the rank of supervisor, professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, the Director of Engineering & Building Services, the President & C.E.O., the Senior Vice-President, the Vice-President Division of Nursing, the Vice-President Human Resources 8-Hospital Services, the Vice-President Finance & Supply Services, the Director of Financial Services, the Director of Human Resource Services, Accountants, the Manager Admitting & Registration Services, Health Records Administrators, Health Record Technicians, the Hospital Librarian, employees in the Human Resources Department, the Secretary to the President & C.E.O., the Secretary to the Senior Vice-President, the Secretary to the Vice-President Nursing Division of Nursing, the Secretary to the Vice-President Human Resource & Hospital Services, the Secretary to the Vice-President Finance & Supply Services, the Secretary to the Vice-President Foundation and Community Services, the Secretary to the Director of Financial Services, the Secretary to the Director of Nursing, Secretary to the Medical Staff, the Secretary to the Director of Radiology, the Secretary to the Director of Laboratory, the Secretary to the Director of Psychiatry, the Supervisor and Dispatcher in S.P.D., the Head Orderly, the Head Ward Clerk, the Supervisor Medical Transcription Centre, Payroll Clerks, and persons in bargaining units for which another trade union hold bargaining rights as of November 1, 2009" (315 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	248
Number of persons who cast ballots	84
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	83
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	64
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	0

2445-09-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Lincare Ltd. (Respondent)

Unit: "all employees of Lincare Ltd. at 332 Nantucket Boulevard in the City of Toronto, save and except shift supervisors, those above the rank of shift supervisor, sales, office and clerical personnel, security personnel and temporary workers" (103 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	114
Number of persons who cast ballots	94
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	66
Number of segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	52
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	19

2456-09-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Essential Home Services, a Division of Direct Energy Marketing Ltd. (Respondent)

Unit: "all clerical employees of Essential Home Services, a Division of Direct Energy Marketing Ltd. who work twenty-four (24) hours a week or less in the central region save and except supervisors, those above the rank of supervisor, residential/commercial sales associates, energy management consultants, account associates, secretaries to department managers, and those employees in the Human Resource, Budget, Regulatory Affairs and Corporate Affairs departments" (26 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

2482-09-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 822 (Applicant) v. Maple Leaf Sports & Entertainment Ltd. (Respondent)

Unit: "all hair and makeup employees of Maple Leaf Sports & Entertainment Ltd. in the City of Toronto save and except Event Co-ordinator and persons above that rank" (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2508-09-R: Health Care and Service Workers Union, Local 304 affiliated with the Christian Labour Association of Canada (Applicant) v. 2035244 Ontario Inc. carrying on business as Greenway Retirement Village (Respondent)

Unit: "all employees of 2035244 Ontario Inc. carrying on business as Greenway Retirement Village in the city of Brampton, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (28 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2531-09-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada) (Applicant) v. Nutritional Management Services Ltd. (Respondent)

Unit: "all employees of Nutritional Management Services Ltd. that are employed at Valleyview Home for the Aged located at 350 Burwell Road, St. Thomas, Ontario N4P 0A3, save and except supervisors and those above the rank of supervisors" (22 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

2549-09-R: Workers United Ontario Council (Applicant) v. Woodgreen Red Door Family Shelter (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Woodgreen Red Door Family Shelter in the city of Toronto, save and except supervisors, persons above the rank of supervisor, office staff, placement students and students employed during the school vacation period" (74 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	84
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	35
Number of ballots marked in favour of intervener	3
Number of ballots segregated and not counted	0

2601-09-R: Workers United Ontario Council (Applicant) v. Cancord Inc. (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees employed in Hamilton, Ontario, except overseers, those above the rank of overseer, office staff and persons acting in a confidential or supervisory capacity, or having authority to hire, discharge, suspend or otherwise effect changes in the status of employees" (11 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

2620-09-R: Canadian Union of Public Employees (Applicant) v. Revera Retirement LP operating as Bough Beeches Place Retirement Residence (formerly known as REIT c.o.b. as Bough Beeches Place, Meadowcroft Place) (Respondent) v. Ontario Federation of Health Care Workers, LIUNA Local 1110 (Intervener)

Unit: "all employees of Revera Retirement LP operating as Bough Beeches Place Retirement Residence (formerly known as REIT c.o.b. as Bough Beeches Place, Meadowcroft Place), (1130 Bough Beeches Boulevard, Mississauga, Ontario) in the City of Mississauga, Ontario save and except Registered Nurses, Supervisors, Maintenance, Clerical and those persons above the rank of Supervisor" (56 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	56
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	38
Number of ballots marked in favour of intervener	6
Number of ballots segregated and not counted	0

2640-09-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Royal Host Limited Partnership c.o.b. as Chimo Hotel (Respondent)

Unit: "all employees of Royal Host Limited Partnership c.o.b. as Chimo Hotel employed at 1199 Joseph Cyr Street in the City of Ottawa in the Guest Services Department, save and except supervisors and persons above the rank of supervisor." (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2646-09-R: Teamsters Local Union No. 419 (Applicant) v. BFI Canada Inc. (Respondent)

Unit: "all employees of BFI Canada Inc. in the City of Vaughan, Province of Ontario working as equipment operators, excluding supervisors, persons above the rank of supervisor, office, clerical, sales staff, maintenance and mechanical staff and those employees covered under a subsisting collective agreement" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2652-09-R: UFCW Canada Local 1000A (Applicant) v. AmerisourceBergen Canada Corporation (Respondent)

Unit: "all employees of AmerisourceBergen Canada Corporation, located at 333 Matheson Blvd. West, Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, any persons working in the IT department, any persons working in Quality Assurance/Quality Control (QAQC) department, contract workers and temporary workers and customer service representatives (CSR)" (80 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	68
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	66
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	54
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	2

2664-09-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Royal Oak Long Term Care Centre (Respondent)

Unit: "all maintenance employees employed by Royal Oak Long Term Care Centre in the City of Kingsville save and except supervisors and those above the rank of supervisor" (2 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2685-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Ainsworth Inc. (Respondent)

Unit: "all employees of Ainsworth Inc. who perform maintenance work at the Toronto-Dominion Centre, inclusive of 66 Wellington Street West, 77 King Street West, 100 Wellington Street West, 79 Wellington Street West, 222 Bay Street, 95 Wellington Street West, Toronto, save and except supervisors, persons above the rank of supervisor, officer, CSR/dispatch, clerical staff and students, and employees covered by a valid subsisting collective agreement" (12 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2703-09-R: Teamsters Local Union No. 419 (Applicant) v. Waste Services (CA) Inc. (Respondent)

Unit: "all employees of Waste Services (CA) Inc. working in or out of the City of Barrie, Ontario, excluding supervisors, persons above the rank of supervisor, office, clerical, sales staff and temporary workers" (78 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	78
Number of persons who cast ballots	69
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	0

2737-09-R: Canadian Union of Public Employees (Applicant) v. Transportation Health & Safety Association of Ontario (Respondent)

Unit: "all employees of Transportation Health & Safety Association of Ontario in the City of Mississauga, save and except supervisors and persons above the rank of supervisor" (27 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

2759-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. Air Canada Component of CUPE (Respondent)

Unit: "all employees of Air Canada Component of CUPE employed as Executive Assistants, Legal Administrative Secretaries, and Assistants of Administration, excluding all other employees and supervisors and those above the rank of supervisor" (4 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

2760-09-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada) (Applicant) v. Waterloo Regional Homes For Mental Health Inc. (Respondent)

Unit: "all Waterloo Regional Homes for Mental Health Inc. employees while working in the Crisis Respite Residential Program working in the City of Kitchener, save and except supervisors and persons above the rank of supervisor and students employed during the summer vacation period" (31 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	2

2761-09-R: Workers United Ontario Council (Applicant) v. Delta Family Resource Centre (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Delta Family Resource Centre in the Municipality of Metropolitan Toronto, save and except Executive Director, persons above the rank of Executive Director, Office Manager, Team Leader, Program Director, Program Coordinator, Project Coordinators, Family Resource Coordinator, seasonal students or those students working 14 hours or less a week and those casual staff hired for replacement contracts of four months" (25 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2762-09-R: Canadian Union of Public Employees (Applicant) v. County of Renfrew Ontario Works (Respondent)

Unit: "all Ontario Works Agents and Customer Service Representatives employed at the County of Renfrew Ontario Works, save and except managers and persons above the rank of manager" (22 employees in unit) *(Clarity Note) (Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	0

2766-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. London Hospitality Inc. o/a Days Inn (Respondent)

Unit: "all employees of London Hospitality Inc. o/a Days Inn in the City of London, save and except front desk staff and persons exercising managerial function" (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	3

Applications for Certification Dismissed Without Vote

2293-09-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Selba Industries Inc. (Respondent) v. Carpenters Union Central Ontario Regional Council (Intervener)

Applications for Certification Dismissed Subsequent to Vote

1548-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Executive Maintenance Services Inc. (Respondent)

Unit: "all employees of Executive Maintenance Services Inc. employed at 85 and 89 Skymark Drive, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff." (6 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

1697-09-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Bostt Building Corporation Limited and, Chamberlain Construction Services Limited (Respondents)

Unit: "all construction labourers in the employ of Bostt Building Corporation Limited and Chamberlain Construction Services Limited in the industrial, commercial and institutional sector of the construction industry in the Province of

Ontario and all construction labourers in the employ of Bostt Building Corporation Limited and Chamberlain Construction Services Limited in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working forepersons and persons above the rank of non working foreperson" (3 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2220-09-R: Workers United Ontario Council (Applicant) v. CLS Catering Services Ltd. (Respondent) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Intervener)

Unit: "all employees of CLS Catering Services Limited in its Airport Services Division at Lester B. Pearson International Airport, in the City of Mississauga, save and except cleaners, contractors, customer services, supervisors, persons above the rank of supervisor and office staff" (170 employees in unit)

Number of names of persons on revised voters' list	200
Number of persons who cast ballots	192
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	185
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	77
Number of ballots marked against applicant	106
Number of ballots segregated and not counted	4

2450-09-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Oakville United Taxi Ltd. (Respondent)

Unit: "all employees of Oakville United Taxi Ltd. operating as owners and/or drivers of taxi cabs, licensed to operate in the Town of Oakville, and dispatchers, save and except supervisors and office and clerical staff." (114 employees in unit)

Number of names of persons on revised voters' list	164
Number of persons who cast ballots	123
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	79
Number of segregated ballots cast by persons whose names appear on voter's list	40
Number of segregated ballots cast by persons whose names do not appear on voters' list	4

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	53
Number of ballots segregated and not counted	44

2451-09-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Oakville Taxi Services Inc. c.o.b. as Halton Taxi (Respondent)

Unit: "all employees of Oakville Taxi Services Inc. c.o.b. as Halton Taxi operating as owners and/or drivers of taxi cabs, licensed to operate in the Town of Oakville, save and except supervisors, dispatchers, multi-car/multi-plate drivers, persons above the rank of dispatcher, office and clerical staff, and independent contractors." (37 employees in unit)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	5

2452-09-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. AA Cab Oakville Inc. (Respondent)

Unit: "all employees of AA Cab Oakville Inc. operating as owners and/or drivers of taxi cabs licensed to operate in the Town of Oakville save and except supervisors, dispatchers, multi-car/multi-plate drivers, persons above the rank of dispatcher, office and clerical staff, and independent contractors." (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

2568-09-R: Workers United Ontario Council (Applicant) v. Compass Group Canada Ltd. (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Compass Group Canada Limited at Vermont Square save and except supervisors, persons above the rank of supervisor and general administration staff" (25 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots marked in favour of intervener	6
Number of ballots segregated and not counted	0

2616-09-R: Teamsters Local Union No. 419 (Applicant) v. U-Pak Disposal (1989) Limited (Respondent)

Unit: "all employees of the company working in or out of the City of Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff" (110 employees in unit)

Number of names of persons on revised voters' list	128
Number of persons who cast ballots	117
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	72
Number of segregated ballots cast by persons whose names appear on voter's list	43
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	57
Number of ballots segregated and not counted	45

2622-09-R: Teamsters Local Union 938 (Applicant) v. Ryder Truck Rental Canada Ltd. (Respondent)

Unit: "all employees of Ryder Truck Rental Canada Ltd. in the City of Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, and sales staff including parts and counter persons, and summer students employed during the vacation period" (14 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

2671-09-R: International Union of Operating Engineers, Local 793 (Applicant) v. Watson Building Supplies Inc. (Respondent)

Unit: "all employees of Watson Building Supplies Inc. working in and out of the City of Barrie save and except foremen, persons above the rank of foreman, office and clerical staff, sales staff, dispatchers, and students employed during the school vacation period" (30 employees in unit)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	30

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	0

2681-09-R: United Food & Commercial Workers, Local 206 (Applicant) v. Nunes Restaurant Inc. c.o.b. as Swiss Chalet Restaurant (Respondent)

Unit: "all employees of the Nunes Restaurant Inc. Carrying on business as Swiss Chalet Restaurant for all persons employed as servers, buspersons, kitchen staff, cashiers, bartenders, dishwashers, seaters/greeters, take out staff and students, save and except Assistant Manager and teammates above the rank of Assistant Manager" (39 employees in unit)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	1

2725-09-R: Ontario Public Service Employees Union (Applicant) v. Versa-Care Maple View Nursing Home (Owen Sound) (Respondent) v. Health Care and Service Workers Union, Local 304 affiliated with the Christian Labour Association of Canada (Intervener)

Unit: "all employees of Versa-Care Maple View Nursing Home (Owen Sound), save and except the Administrator, the Director of Care, Assistant Director of Care, Supervisors and persons above the rank of Supervisor, office, clerical and maintenance staff, persons employed in a Co-operative Education Program and Students employed during the school vacation period" (35 employees in unit)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	t 23
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

0755-09-R: The International Union of Painters and Allied Trades, Local Union 1891, (Applicant) v. Middlesex Installations Ltd., (Respondent)

0762-09-R: National Organized Workers (Applicant) v. Johnson Controls Inc. (Respondent) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 251 (Intervener)

2605-09-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Rexnord Canada Ltd. (Respondent)

2788-09-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 1046627 Ontario Limited c.o.b. as Coram Construction Group (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2951-07-R: Universal Workers Union, Labourers' International Union of North America, Local 183(Applicant) v. Toran Construction, Toran Carpentry Inc. (Respondents) *(Granted)*

0527-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bonum Contracting Inc. and, Roadside Construction Inc. (Respondents) *(Withdrawn)*

1468-09-R: International Union of Operating Engineers, Local 793 (Applicant) v. GTA Concrete Enterprises Ltd. and, GTA Concrete Pumps Inc. (Respondents) *(Granted)*

SALE OF A BUSINESS

2951-07-R: Universal Workers Union, Labourers' International Union of North America, Local 183(Applicant) v. Toran Construction, Toran Carpentry Inc. (Respondents) *(Granted)*

0858-08-R: The Ottawa Student Transportation Authority (Applicant) v. The Ottawa-Carleton District School Board, The Ottawa Catholic School Board, The Ottawa Catholic School Board Non-Affiliated Management, Professional and Support Group, The Ontario Secondary School Teachers' Federation, District 25 (Educational Support Professionals Bargaining Unit), and and, The Canadian Union of Public Employees, Local 2357 (Respondents) *(Withdrawn)*

0527-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bonum Contracting Inc. and, Roadside Construction Inc. (Respondents) *(Withdrawn)*

1468-09-R: International Union of Operating Engineers, Local 793 (Applicant) v. GTA Concrete Enterprises Ltd. and, GTA Concrete Pumps Inc. (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2067-09-R: Sylvia Goyan Redmond (Applicant) v. CAW Local 229 (Respondent) v. St. Joseph's Hospital (Intervener) *(Dismissed)*

Unit: "the employees of [St. Joseph's Care Group in the City of Thunder Bay] in the classification listed on Schedule A attached hereto save and except stationary engineers, foreman, foreladies, persons above the rank of foremen, or forelady, persons regularly employed for less than twenty five (25) hours per week, full time watchmen, professional help, and members of the Sisters of St. Joseph of Sault Ste. Marie" (161 employees in unit)

2470-09-R: Bargaining Unit Employees of Alfa Paper Products Inc. (Applicant) v. Teamsters Local Union No. 879, Affiliated with the International Brotherhood of Teamsters (Respondent) v. Alfa Paper Products Inc. (Intervener) *(Granted)*

Unit: "Alfa Paper Products Inc. in the City of Hamilton recycling company whose employees positions consist of sorters, machine operators, baler operators and truck drivers such as tandums, roll offs and tri axles." (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent1	1
Number of ballots segregated and not counted	0

2541-09-R: Rohit Talwar - (For the Table Game Inspectors) (Applicant) v. Service Employees International Union Local 2 (Respondent) v. Ontario Lottery and Gaming Corporation c.o.b. as OLG Brantford Casino (Intervener) *(Dismissed)*

Unit: "all Table Games Inspectors (formerly Floor Supervisors) and Dual Rate Pit Managers, when performing the duties of Table Games Inspectors, of OLG Casino Brantford, in the City of Brantford." (69 employees in unit)

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	63
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	59
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	32
Number of ballots marked against respondent	27
Number of ballots segregated and not counted	4

2542-09-R: Katie Meggitt (Applicant) v. United Food & Commercial Workers Canada, Local 175 (Respondent) *(Granted)*

Unit: "all employees of 1167471 Ontario Limited carrying on business as Mudges (E) Appliances & Service Shop (Wharncliffe) in the City of London, save and except General Manager, Assistant General manager, President/Owner, and all those above the rank of Assistant General Manager." (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

2629-09-R: Employees of Triumbari Corporation (Applicant) v. Teamsters Local Union 847 (Respondent) v. Triumbari Corp. (Intervener) *(Granted)*

Unit: "all seniority employees of Triumbari Corp. in the city of Brampton, save and except, supervisors, persons above the rank of supervisor, office, clerical, and sales staff" (12 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent1	1
Number of ballots segregated and not counted	0

2653-09-R: George Miles (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 588-G (Respondent) v. Canadian Bank Note Company, Limited (Intervener) *(Granted)*

Unit: "all employees of the employer in Bindery 1 at 145 Richmond Road in Ottawa, Ontario" (35 employees in unit)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	26
Number of ballots segregated and not counted	0

2698-09-R: Joao Miguel Grego (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council (Respondent) *(Terminated)*

2773-09-R: Ethel M. Bull (Applicant) v. Ontario Nurses' Association (Respondent) *(Granted)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1241-07-U: Canadian Union of Public Employees and its Local 3695 (Applicant) v. Algoma Manor (Respondent) *(Withdrawn)*

3364-07-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Pioneer Construction Inc. (Respondent) *(Withdrawn)*

1085-08-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Give and Go Prepared Foods Corp. (Respondent) *(Withdrawn)*

0010-09-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Oakville United Taxi Ltd. (Respondent) *(Withdrawn)*

0077-09-U: The United Brotherhood of Carpenters and Joiners of America - Local 446 (Applicant) v. The United Brotherhood of Carpenters and Joiners of America (Respondent) v. Greater Ontario Regional Council of Carpenters and Drywall & Allied Workers on its own behalf and on behalf of its constituent local unions (Intervener) *(Dismissed)*

0102-09-U: Ontario Nurses' Association (Applicant) v. Hamilton Health Sciences, St. Joseph's Healthcare Hamilton, University Health Network, Ontario Hospital Association (Respondents) *(Dismissed)*

0600-09-U: Dean Potvin (Applicant) v. Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union 647 (Respondent) v. Weston Bakeries Limited (Intervener) *(Dismissed)*

0727-09-U: Cynthia Roach (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. Specialty Care, Bloomington Cove (Intervener) *(Withdrawn)*

0813-09-U; 1015-09-U: National Organized Workers (Applicant) v. Johnson Controls Inc. and, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 251 (Respondents); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 251 (Applicant) v. National Organized Workers and the persons representing that organization, including Ricardo Machado, Raj Singh, and its officers and executive members (Respondent) v. Johnson Controls Interiors Manufacturing Canada ULC (Intervener) *(Withdrawn)*

0839-09-U: Mrs. Joannie Bedore (Applicant) v. United Food & Commercial Workers Canada (Respondent) v. Metro Ontario Inc. (Intervener) *(Withdrawn)*

1017-09-U: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Price Chopper (Respondent) *(Withdrawn)*

1161-09-U: Jacqueline Morris (Applicant) v. Unite Here Local 75 (Respondent) v. Liverton Hotels International (Intervener) *(Withdrawn)*

1233-09-U: Jose Zuluaga (Applicant) v. Communications, Energy and Paperworkers Union Local 1646 (Respondent) *(Dismissed)*

1409-09-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fairview Electric Contractors Limited and Anthony Recine, Frank Zito and, Luciano Recine (Respondents) *(Endorsed Settlement)*

1542-09-U: Manuela Pechova (Applicant) v. Four Seasons Hotel (Respondent) *(Withdrawn)*

1615-09-U: Mohammad Nazim (Applicant) v. United Food and Commercial Workers Canada, Local 1000A (Respondent) *(Dismissed)*

1625-09-U: Silvano Lochner (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Municipal Property Assessment Corporation (Intervener) *(Dismissed)*

1646-09-U: Michel Vickers (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 1470 (Respondent) v. Norampac Inc. (Intervener) *(Dismissed)*

1719-09-U: Gwendolyn Held (Applicant) v. International Association of Machinists and Aerospace Workers Local Lodge 268 (Respondent) v. Pharmetics Inc. (Intervener) *(Dismissed)*

1783-09-U: United Food and Commercial Workers Canada (Applicant) v. Saydat Hospitality Inc. o/a Comfort Inn Welland (Respondent) *(Endorsed Settlement)*

1882-09-U: Donavon A. Rhoden (Applicant) v. United Food and Commercial Workers Canada, Local 1000A (Respondent) v. Loblaw Companies Limited (Intervener) *(Withdrawn)*

1978-09-U: Electrical and Control Technicians from Sector 1/Unit 19 (Applicant) v. The Power Workers Union (Respondent) v. Ontario Power Generation Inc. (Intervener) *(Withdrawn)*

1990-09-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wild Wing Restaurants Inc. and, Restaurant Supply Group Inc. (Respondents) *(Withdrawn)*

1998-09-U: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Carquest Auto Parts (Respondent) *(Withdrawn)*

2024-09-U: Edmund K. Badu (Applicant) v. Teamsters Local Union 847 (Respondent) *(Dismissed)*

2099-09-U: Tom Goddard (Applicant) v. Ontario Public Service Employee's Union (Respondent) v. Canadian Blood Services (Intervener) *(Dismissed)*

2133-09-U: Sonia Gleva Davis-Bailey (Applicant) v. Canadian Union of Public Employees and its Local 905 (Respondent) v. The Regional Municipality of York (Intervener) *(Withdrawn)*

2154-09-U: Canadian Office and Professional Employees Union Local 491 (Applicant) v. Canadian Union of Public Employees ("CUPE") (Respondent) *(Withdrawn)*

2232-09-U: Maria Papa (Applicant) v. United Food & Commercial Workers Canada, Local 175 (Respondent) v. Kraus Inc. (Intervener) *(Terminated)*

2267-09-U: Karena Gentles (Applicant) v. United Steelworkers (Respondent) *(Withdrawn)*

2268-09-U: Euphema Lindsay (Applicant) v. United Steelworkers (Respondent) *(Withdrawn)*

2294-09-U: Ramnath Mahase (Applicant) v. CAW Local 4457 (Respondent) *(Dismissed)*

2319-09-U: United Food and Commercial Workers Union, Local 1977 (Applicant) v. OD International, Inc., o/a Office Depot (Respondent) *(Withdrawn)*

2349-09-U: Brenda Livingston (Applicant) v. United Food & Commercial Workers Canada, Locals 175 & 633 (Respondent) v. Metro Ontario Inc. (Intervener) *(Withdrawn)*

2442-09-U: Abdul Rouf (Applicant) v. CAW Local 40 (Respondent) *(Terminated)*

2457-09-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Electro Instal Corporation (Respondent) *(Withdrawn)*

2524-09-U: Andrew Watson (Applicant) v. Richmond Hill Professional Fire Fighters Association, I.A.F.F. Local 1957 (Respondent) *(Dismissed)*

2625-09-U: International Brotherhood of Electrical Workers Local 586 (Applicant) v. GilbonServices Inc. O/A Mr. Electric, 4000862 Canada Incorporated 375549 Canada Inc. o/a MaxSys (Respondent) *(Withdrawn)*

2633-09-U: Michael Aube (Applicant) v. Hamilton Fire Director of Fire Operations/ Deputy Chief David Cunliffe Assistant Deputy Chief Phil Thorborn (Respondent) *(Dismissed)*

2677-09-U: International Union of Operating Engineers, Local 793 (Applicant) v. Riverton Forming Inc. (Respondent) *(Granted)*

2708-09-U: Angelo Lavalle (Applicant) v. Teamsters Local Union 938 (Respondent) v. Trans Western Express (Intervener) *(Dismissed)*

2850-09-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. MJ Manufacturing - A Division of Martinrea International Inc. (Respondent) *(Withdrawn)*

APPLICATIONS FOR INTERIM ORDER

2051-09-M: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ferro Canada Inc. (Respondent) *(Withdrawn)*

2530-09-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Belair Plumbing & Mechanical Inc. (Respondent) *(Dismissed)*

2849-09-M: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. MJ Manufacturing - A Division of Martinrea International Inc. (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2689-09-M: Garland Commercial Ranges Ltd. (Applicant) v. Labourers International Union of North America, Local 506 (Respondent) *(Granted)*

FINANCIAL STATEMENT

3505-08-M: Timothy G. Mitchinson (Applicant) v. International Brotherhood of Electrical Workers Workers, Local Union 303 (Respondent) *(Dismissed)*

JURISDICTIONAL DISPUTES

2041-08-JD: Communications, Energy and Paperworkers of Canada, Local 92 (Applicant) v. AbitibiBowater Canada Inc., International Association of Machinists and Aerospace Workers, Lodge 771 (Respondents) *(Dismissed)*

3489-08-JD: Carpenters Union, Central Ontario Regional Council of Carpenters and Joiners of America (Applicant) v. Labourers' International Union of North America, Local 506 and, Bird Construction Co. Ltd. (Respondents) *(Dismissed)*

0006-09-JD: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Veolia Environmental Services Inc., International Brotherhood of Painters and Allied Trades, Local 205 (Respondents) v. Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0146-08-M: Nello Falomo (Applicant) v. HVAC Fireplace Installation Inc. (Respondent) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3493-08-OH: John Jessop (Applicant) v. Investigative Research Group (Respondent) *(Withdrawn)*

2348-09-OH: Kristen Roger Poisson (Applicant) v. B. Denomme Construction Ltd. (Respondent) *(Withdrawn)*

2641-09-OH: Keith Hargreaves (Applicant) v. Bruce R. Smith Ltd. (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

4082-04-G: International Union of Operating Engineers, Local 793 (Applicant) v. Sterling Crane - A Division of Procrane Inc. (Respondent) *(Granted)*

2128-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Alberici Constructors (Respondent) *(Withdrawn)*

2935-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508 (Applicant) v. Superior Industrial Services (Respondent) v. Millwrights & Machine Erectors, Local 1425 (Intervener) *(Terminated)*

3782-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Johnson Controls Ltd. (Respondent) *(Terminated)*

0132-09-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. SMRS Construction (Respondent) *(Withdrawn)*

0374-09-G: Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc. (Respondent) *(Withdrawn)*

0532-09-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bonum Contracting Inc. and, Roadside Construction Inc. (Respondents) *(Withdrawn)*

1670-09-G; 1671-09-G: Sheet Metal Workers' International Association, Local 473 (Applicant) v. Crossby Dewar Inc. (Respondent) v. Electrical Power Systems Construction Association (Intervener); Sheet Metal Workers' International Association, Local 473 (Applicant) v. Bruce Power LP (Respondent) v. Electrical Power Systems Construction Association (Intervener) *(Withdrawn)*

1853-09-G; 1854-09-G: I.B.E.W. Electrical Power Council of Ontario on behalf of International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Bruce Power LP, Electrical Power Systems Construction Association and, Aecon Construction Group Inc. (Respondents); I.B.E.W Electrical Power Council of Ontario on behalf of International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Bruce Power LP, Electrical Power Systems Construction Association and, Comstock Canada Ltd. (Respondents) *(Terminated)*

1977-09-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Torget Contracting Inc. (Respondent) *(Granted)*

1994-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cap Concrete Structures Ltd. (Respondent) *(Granted)*

2135-09-G: Construction and Allied Workers Local 607 (Applicant) v. Carillion Canada Inc. (Respondent) *(Withdrawn)*

2174-09-G: Labourers' International Union of North America, Local 506 (Applicant) v. Greenspoon Specialty Contracting Ltd. (Respondent) *(Withdrawn)*

2191-09-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. The Roberts Group Inc. (Respondent) *(Withdrawn)*

2205-09-G: United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 787 (Applicant) v. Harvey Refrigeration Ltd. (Respondent) *(Withdrawn)*

2284-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Ainsworth Inc. c.o.b. as Superior Trade Services (Respondent) *(Withdrawn)*

2315-09-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths Forgers and Helpers (Applicant) v. Black and McDonald, Atomic Energy of Canada Limited and, Bruce Power (Respondents) *(Withdrawn)*

2355-09-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Bruce Power LP (Respondent) *(Withdrawn)*

2356-09-G: International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. Thermo Systems Insulation Ltd. (Respondent) *(Endorsed Settlement)*

2357-09-G: International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. D & F Insulation Ltd. (Respondent) *(Endorsed Settlement)*

2443-09-G: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wild Wing Restaurants Inc. (Respondent) *(Withdrawn)*

2483-09-G: Labourers' International Union of North America, Local 506 (Applicant) v. Alberici Constructors (Respondent) *(Withdrawn)*

2500-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Hi Tek Dev Inc. (Respondent) *(Withdrawn)*

2539-09-G: International Union of Painters and Allied Trades, Local 1795 (Glaziers) (Applicant) v. M & I Aluminum Ltd. (Respondent) *(Withdrawn)*

2570-09-G: International Union of Elevator Constructors, Local 50 (Applicant) v. ThyssenKrupp Elevators (Canada) Limited (Respondent) *(Terminated)*

2617-09-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Edward C. Kosciuch c.o.b. as All City Drywall & Acoustics (Respondent) *(Endorsed Settlement)*

2618-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C.F. Concrete & Drain Inc. (Respondent) *(Endorsed Settlement)*

2619-09-G: The United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Massicotte Construction Ltd. (Respondent) *(Withdrawn)*

2621-09-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. B. Gottardo Construction Ltd. (Respondent) *(Withdrawn)*

2627-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fairview Electric Contractors Limited (Respondent) *(Endorsed Settlement)*

2632-09-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Sirron Electrical Contractor Corp., and David Norris, a Director (Respondent) *(Withdrawn)*

2637-09-G: The United Brotherhood of Carpenters & Joiners of America, Local 249 (Applicant) v. Belrock Construction Limited (Respondent) *(Withdrawn)*

2642-09-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Hydro One Inc. (Respondent) *(Withdrawn)*

2661-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. L & A Ltd. (Respondent) *(Granted)*

2667-09-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Sirron Electrical Contracting Corp. and, David Norris, a Director (Respondents) *(Withdrawn)*

2675-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Teston Pipelines Limited/Clearway Construction Inc. (Respondent) *(Withdrawn)*

2697-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Extreme Drilling Inc. (Respondent) *(Granted)*

2716-09-G; 2717-09-G: Sheet Metal Workers International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) *(Granted)*

2741-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mehmet Alci c.o.b. as Alci Contracting Co. (Respondent) *(Granted)*

2747-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Skywall Systems Inc. (Respondent) *(Granted)*

2805-09-G; 2806-09-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Dom-Meridian Construction Ltd./, D.I. Construction Co. Inc. (Respondents) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

0178-Y2-ES: A K Towing Operating as A-Kwik Transport (Applicant) v. Charanjit Gill and, Director of Employment Standards (Respondents) *(Granted)*

0588-04-ES; 0727-04-ES; 0731-04-ES; 0733-04-ES; 0739-04-ES: Robert Hamilton, a Director of 2000676 Ontario Limited (Applicant) v. Ramina Akter et al and, Director of Employment Standards (Respondents); Robert Hamilton, a Director of 862500 Ontario Limited o/a Tritech Precision Machining (Applicant) v. Ramina Akter et al and, Director of Employment Standards (Respondents); Thomas Davis, a Director of 3995585 Canada Inc. (Applicant) v. Ramina Akter et al and, Director of Employment Standards (Respondents); Thomas Davis, a Director of 3885917 Canada Inc. (Applicant) v. Ramina Akter et al and, Director of Employment Standards (Respondents); 3995585 Canada Inc. (Applicant) v. Ramina Akter et al and, Director of Employment Standards (Respondents) *(Dismissed)*

1953-07-ES: Christopher Henderson, a director of Proteus Craftworks Inc. and, Richard Hotta, a director of Proteus Craftworks Inc. (Applicants) v. Mahammad Badiuzzaman, Paulo Barrientos, Thu Bui, Robert Cadogan, Chee-Man Chan, Wing Sang Chan, Nam Van Chu, Said Dakha, Alla Gluskin, Phat Huynh, Simon Ip, Chedomir Kalinic, Gary Koliopolos, Chhay Kom, Hoi Yew Kwan, Chi Wing Leung, David McGill, Long Van Nguyen, Lidija Nikolic, Dennis F. Outar, Dalin Pan, Alfredo Paragas Jr., Manuel Penas, Long Cuu Pham, Azmi Qubti, Mahadai Ramchand, Norm Randall, Lio Roiberg, Nabil Salback, Jagdeep Singh Sangha, Luckman Sathasivam, John Sham, Dhanraj Singh, Maurice G. Smith, Francis Suen, Leang Taing, Seung Wah Tam, Margarita Tan, Tong Nhat To, Frank E. Toppin, Kim Thach Tran, Vinh Nhan Tran, Khuong Dinh Tuan, Georgios Vavaroutsos, Louis Wenzl, Gordon Wilson, Boa Ming Zeng, Jian Zhen Zhang and, Director of Employment Standards (Respondents) *(Dismissed)*

2638-08-ES: Cascada Medical Inc. o/a Cascada Salon & Spa (Applicant) v. Victoria Powell and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3279-08-ES: Todor Pandeliev (Applicant) v. JDS Uniphase Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

3441-08-ES: Cascada Medical Inc. o/a Cascada Salon & Spa (Applicant) v. Michelle Pearce and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3632-08-ES: Sleep Country Canada Inc. (Applicant) v. Michel Bertrand and, Director of Employment Standards (Respondents) *(Granted)*

0054-09-ES: Zoran Sarajlic (Applicant) v. Teleperformance Canada Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

0326-09-ES: 730372 Ontario Limited o/a Blow Mould Engineering (Applicant) v. Monique Bannen and , Director of Employment Standards (Respondents) *(Dismissed)*

0340-09-ES: Michael Boucher (Applicant) v. G.V.E. Inc., and, Director of Employment Standards (Respondents) *(Withdrawn)*

0375-09-ES: Tom Schnarr, a Director of 6497667 Canada Inc. o/a The Thirsty Toad (Applicant) v. Amine Khouri and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0376-09-ES: Tom Schnarr, a Director of 6497667 Canada Inc. o/a The Thirsty Toad (Applicant) v. André Robidoux and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0377-09-ES: Tom Schnarr, a Director of 6497667 Canada Inc. o/a The Thirsty Toad (Applicant) v. Mark Milloy and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0380-09-ES: Tom Schnarr, a Director of 6497667 Canada Inc. o/a The Thirsty Toad (Applicant) v. Joel Baskin and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0381-09-ES: Tom Schnarr, a Director of 6497667 Canada Inc. o/a The Thirsty Toad (Applicant) v. Karine Beaumier and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0391-09-ES: 887019 Ontario Inc. o/a Wag-A-Way Kennels (Applicant) v. Stacey Dittmer and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0392-09-ES: 887019 Ontario Inc. o/a Wag-A-Way Kennels (Applicant) v. Erica Larry and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0703-09-ES; 0704-09-ES: 1558809 Ontario Inc. o/a Fitzy's Oyster Bar (Applicant) v. Michelle Adams and, Director of Employment Standards (Respondents); 1558809 Ontario Inc. o/a Fitzy's Oyster Bar (Applicant) v. Lorraine (Rainy) Chappell and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0867-09-ES: Ziad Alkhaldy (Applicant) v. Sobeys Capital Incorporated o/a Sobeys Express and, Director of Employment Standards (Respondents) *(Dismissed)*

0887-09-ES: Kathy Hutchison (Applicant) v. 3925404 Canada Inc. o/a Deerhurst Resort and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0937-09-ES: White, Duncan, Linton LLP (Applicant) v. Steven J. O'Melia and, Director of Employment Standards (Respondents) *(Dismissed)*

0968-09-ES: Maria Fatima Desousa (Applicant) v. Co-Fo Concrete Forming Construction Limited and , Director of Employment Standards (Respondents) *(Dismissed)*

1025-09-ES: Benjamin W.C. Carruthers (Applicant) v. Beefeaters Inc./P.S. Shop at Home Food Service Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1039-09-ES: 2029944 Ontario Ltd. o/a Grand Prix Kartways (Applicant) v. Brian Dixon and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1072-09-ES: Umaru M. Barrie (Applicant) v. Santas Choice Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

1075-09-ES: Blinds To Go, Inc. (Applicant) v. Joshua Labelle and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1172-09-ES: Gosselin World Flooring Inc. o/a Alexanian Carpet & Flooring (Applicant) v. Debra Briese and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1179-09-ES: 2005302 Ontario Ltd. o/a Fire on the East Side (Applicant) v. Mollie Jacques and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1298-09-ES: Sirju (Max) Deopersad and (Applicant) v. R.E.D. Welding & Fabricating Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1317-09-ES: John Jessop (Applicant) v. Investigative Research Group Inc., Director of Employment Standards (Respondents) *(Withdrawn)*

1338-09-ES: Harvey M. Glower (Applicant) v. Total Security Management Services Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

1374-09-ES: Carlo Carlucci (Applicant) v. Trade Screen Print Limited o/a TSP Graphic Communications and, Director of Employment Standards (Respondents) *(Dismissed)*

1580-09-ES: 1686933 Ontario Limited c.o.b. as Dewar Audio Video Custom Service (Applicant) v. Brian Dewar and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1664-09-ES: June E. Hollenbeck (Applicant) v. Parkbridge Lifestyle Communities Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1710-09-ES: Round Lake Variety (Applicant) v. Pauline Rille and, Director of Employment Standards (Respondents) *(Terminated)*

1724-09-ES: Deena M. Edgar (Applicant) v. Tee-Bee-Que Limited o/a Tunnel Bar-B-Q and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1728-09-ES: Kenneth W.J. Rhodes o/a Rhodes Law Firm (Applicant) v. Jodee Desangher and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1815-09-ES: Pamela Cushman (Applicant) v. Henry Technologies Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1830-09-ES: Premanand Manickavasagar and Radika Manickavasagar and/or Radika Manicks (Applicant) v. Maria Fatima Quan and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1876-09-ES: Daniel Georgen (Applicant) v. Metro Asphalt Sealer & Repairs Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1967-09-ES: Joginder S. Pooni (Applicant) v. The Pic Group and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1988-09-ES: Sarah Wilson (Applicant) v. Greenland Country Haven Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2000-09-ES: Andrea Foote (Applicant) v. CGC Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2058-09-ES; 2059-09-ES; 2060-09-ES; 2061-09-ES; 2062-09-ES: John McDonough (Applicant) v. Redcliff Realty Management Inc./, The Hurley Group and, Director of Employment Standards (Respondents); Nick Edward Amore (Applicant) v. Redcliff Realty Management Inc./, The Hurley Group and, Director of Employment Standards (Respondents); Craig Hardcastle (Applicant) v. Redcliff Realty Management Inc./, The Hurley Group and, Director of Employment Standards (Respondents); Mary Rose Powell (Applicant) v. Redcliff Realty Management Inc./, The Hurley Group and, Director of Employment Standards (Respondents); Diane Borsellino (Applicant) v. Redcliff Realty Management Inc./, The Hurley Group and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2086-09-ES: Sophie Mantha (Applicant) v. DST Consulting Engineers Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2098-09-ES: Agility Logistics, Co. (Applicant) v. Director of Employment Standards (Respondent) *(Withdrawn)*

2173-09-ES; 2235-09-ES: Sanjay D. Chudasama (Applicant) v. Electronic Technology Solutions Inc. and, Director of Employment Standards (Respondents); Electronic Technology Solutions Inc. (Applicant) v. Sanjay D. Chudasama and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2180-09-ES: Diva Esthetics o/a Diva Salon (Applicant) v. Jade Hashey and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2187-09-ES: 2166616 Ontario Inc. o/a Apple Jack's (Applicant) v. Darryl Norris and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2246-09-ES: Sarojini Devi Senha (Applicant) v. Latha Cherian and, Director of Employment Standards (Respondents) *(Terminated)*

2254-09-ES: Norwill Countertops International Inc. (Applicant) v. Martin Kreslin and, Director of Employment Standards (Respondents) *(Dismissed)*

2262-09-ES: Jose T. Kunnathethu (Applicant) v. Kang's Packaging Solutions Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

2277-09-ES: Ranko Curuvija o/a Oglica Trucking (Applicant) v. Marijan Malbasic and, Director of Employment Standards (Respondents) *(Dismissed)*

2358-09-ES: Larry J. Mackenzie (Applicant) v. Ri-Go Lift Trucks Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2377-09-ES: Bill Wolfert, a director of 1035124 Ontario Ltd., o/a Town Line Processing Ltd., Top of the Hill Produce LP, and TOH Farm Produce Ltd. (Applicant) v. Anthony Agresti, Jillian Agresti, Joe Anness, Maria Araujo, Garcia A. Axol, Cervantes Cruz Barbosa, Hernandez Julio Cesar Barrera, Maria Bastista, Mandie Bauer, Ron Beatty, Don K. Boonstra, Gracinda Botelho, Senh Bui, Laurinda Caldas, Daniel Caligagan, Sancia Calisto, Rodriguez Carrasco, Brian R. Cater, Hau Indalecio Cen, Montes A. Chichino, Jose Coelho, Maria Coelho, Luciano Conceical, Jeffery Conn, Cory Constant, Carlos Correia, Gerry Costigan, Luciano Da Luz, Mario Darosa, John De Peuter, Brenda Depalma, Plata Serafin Diaz, Jose Luis Duarte Rodriguez, Kathy Duncan, Miguel Angel Esquivel Arriaga, Maria Fernandes, Anne Ferraz, Antonio Ferraz, Baleandina Ferreira, Valerio Ismael Antonio, Sidonio Freitas, Bruno Diaz Garcia, Alvarez Lazaro Gaxiola, Charles Gomes, Kevin Gomes, Leslie Gomes, Maria Gomes, Luis Sanchez Gomez, Hernandez Rumaldo Gonzalez, Rachpal Grewal, Stefany Grieve, Robles Gilberto Guerrero, Santiago Hernandez, Leslie Holt, Natasha Lacasse, Phet Lauangchaleun, Dwight Lewis, Jessie Lewis, Andres Marcelo, Santana Hector, Liz Macgregor, Douglas Madden, Candida Manso, Tony Matos, Kevin R. May, Mike Mcnaughton, Brad McNeil, Lawrence Meadows, Ana Medeiros, Luiz Medeiros, Gutierrez Leobardo, Menoza S. Mendoza, Ondina Mirassol, Rudas Miguel Angel, Sarah Moon, Silverio C. Murillo, Chieu Nguyen, Delio Oliveira, Maria Helena Oliveira, Rosa Oliveira, Philip Pontes, L. Ramirez-Acevedo, Garcia J. Rangel, Garcia A. Rodrigues, Mario Rodrigues, Otto Ivan Rodrigues, Maria N. Romeiro, Crystal Russell-Medeiros, Linda V. Rutledge, Aguilar Refugio Armando, Miguel Angel Salazar Aguilar, Jose Amasio Salome, Arellano F. Sanchez, Gabino Sandoval Luz, Edmar Santiago, Helio M. Silveira, Maria Sousa, Rogelio Tapia, Candelaria Javier E. Tipacamu, Luis Torres-Tovar, Jose Mauricio Trinidad Carlon, Lisa E. Turturici, Jacinto G. Valdez, Phet Valencia-Perez, Cortez Luis Vasquez, Jhano Ponte Viveiros, Cynthia Wolfert, Derek Wolfert and, Director of Employment Standards (Respondents) *(Terminated)*

2380-09-ES: McRobert Fuels Limited (Applicant) v. Alice Moyer and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2384-09-ES: Barrel Select Inc. (Applicant) v. Megan J. Basten and, Director of Employment Standards (Respondents) *(Withdrawn)*

2420-09-ES: 1759378 Ontario Inc. o/a Makimono Japanese Restaurant (Applicant) v. Kit Wah Cheng and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2440-09-ES: Lamarnic & J. Ltd. (Applicant) v. Lynn Lavergne and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2460-09-ES; 2461-09-ES: Charlie Chaplin World Restaurants Inc. (Applicant) v. Simon P. Hartley and, Director of Employment Standards (Respondents); Charlie Chaplin World Restaurants Inc. (Applicant) v. Justin Gladman and, Director of Employment Standards (Respondents) *(Terminated)*

2468-09-ES: Gene Maw, a director of 1726221 Ontario Inc. (Applicant) v. Reina Zimmerman and, Director of Employment Standards (Respondents) *(Terminated)*

2469-09-ES: Karlijn Reijm (Applicant) v. Cascada Medical Inc. o/a Cascada Salon & Spa and, Director of Employment Standards (Respondents) *(Terminated)*

2507-09-ES: Post Road Health and Diet Inc. (Applicant) v. Sandra Southern and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2509-09-ES: Sugen Ariyaratnam (Applicant) v. Milagro Restaurant and Cantina Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2518-09-ES: Ready Staffing Solutions Inc. (Applicant) v. Sheikalee Ming-Williams and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2519-09-ES: C-Living Inc. (Applicant) v. Serge Arzoumanian and, Director of Employment Standards (Respondents) *(Terminated)*

2529-09-ES: Xtreme Mechanical Ltd. (Applicant) v. Matt Bennet and, Director of Employment Standards (Respondents) *(Terminated)*

2547-09-ES: Claude Michel Lachance (Applicant) v. Cushman & Wakefield Property Tax Services Paralegal Professional Corporation and, Director of Employment Standards (Respondents) *(Dismissed)*

2573-09-ES: SIGPRO Wireless Inc. (Applicant) v. Avinash Gopalakrishnan and, Director of Employment Standards (Respondents) *(Dismissed)*

2647-09-ES: Victoria Greco, a Director of ITR Group Inc. (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

2650-09-ES: Mohamed S. Saheed (Applicant) v. Blue Pine Restuarant Ltd. o/a Patris Restaurant, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2705-09-ES: Barbara Levy, a director of 2124195 Ontario Inc. o/a Savana Restaurant & Lounge (Applicant) v. Sylvie F. Sagna and, Director of Employment Standards (Respondents) *(Terminated)*

2707-09-ES: Elyosafe Limited (Applicant) v. Jason Williams and, Director of Employment Standards (Respondents) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1474-09-HS; 2217-09-HS: Toronto Transit Commission (Applicant) v. Amalgamated Transit Union, Local 113 and , Paul Faustino, Inspector (Respondents); *(Withdrawn)*

2057-09-HS: City of Toronto (Applicant) v. Canadian Union of Public Employees, Local 79, and, Alex Harrett, Inspector (Respondents) *(Withdrawn)*

2306-09-HS: Loblaw Companies Limited (Applicant) v. United Food and Commercial Workers International Union, Local 1000A, Shela Mirza - Inspector Ministry of Labour (Respondents) *(Dismissed)*

2492-09-HS: General Motors of Canada Limited (Applicant) v. David Martin, Canadian Auto Workers Union, Local 1973, John Lepera, Inspector (Respondents) *(Granted)*

2678-09-HS: AMG Logistics and Gary LaPointe (Applicant) v. Thomas Mackay, Inspector (Respondent) *(Dismissed)*

FIRST AGREEMENT - DIRECTION

1852-09-FC: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Consolidated Drilling and Blasting Inc. (Respondent) *(Granted)*

2329-09-FC: Labourers' International Union of North America, Local 625 (Applicant) v. Larry Santos Construction (Respondent) *(Terminated)*

PAY EQUITY ACT

3419-07-PE: Ontario Public Service Employees Union (Applicant) v. Pioneer Youth Services (Toronto) Inc. (Respondent) *(Granted)*

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

2127-09-M: Cedarcroft Place Retirement Residences (Applicant) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 1136 (Respondent) *(Withdrawn)*

SECTOR DETERMINATION (SECTION 153)

2353-08-M: Mechanical Contractors Association Ontario, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Procon Niagara, a division of 1149855 Ontario Inc. (Applicants) v. International Brotherhood of Electrical Workers Construction Council of Ontario, V.K. Mason Construction Co., Lincoln, Welland, Haldimand Building and Construction Trades Council, Brick and Allied Craft Union of Canada, Local 4/Marble Tile and Terrazzo Workers, International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 303, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, International Union of Operating Engineers, Local 793, Labourers' International Union of North America, Local 837, Ontario Building and Construction Trades Council, International Brotherhood of Painters and Allied Trades, Local 1795 (Glaziers), International Union of Elevator Constructors, Local 90, Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 598, Sheet Metal Workers International Association, Local 537, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787, Refrigeration Workers, United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 666 United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 853 (Sprinkler), United Brotherhood of Carpenters and Joiners of America, Local 1007 (Millwrights) (Respondents) v. Crane Rental Association of Ontario, Electrical Power Systems Construction Association, Labourers' International Union of North America, Ontario Provincial District Council (Interveners) *(Granted)*

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 2010

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2421-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bonnechere Excavating Inc. (Respondent)

Unit: "all employees in the employ of Bonnechere Excavating Inc. engaged in the operation of cranes, shovels, bulldozers, or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors employed in all sectors of the construction industry in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (6 employees in unit)

2539-06-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Pedersen Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Pedersen Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Pedersen Construction Inc. in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (6 employees in unit)

0532-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. WB & B Masonry Inc. and, Woodstock Brick & Block (Respondents) v. Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Intervener)

Unit: "all construction labourers in the employ of WB & B Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of WB & B Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0533-08-R: Brick and Allied Craft Union of Canada (Applicant) v. WB & B Masonry Inc. and, Woodstock Brick & Block (Respondents) v. Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Intervener)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of WB & B Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1418-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Porpealia Repair Ltd. (Respondent) v. Essar Steel Algoma Inc. (Intervener)

Unit: "all construction labourers in the employ of Porpealia Repair Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Porpealia Repair Ltd. in all sectors of the construction industry in that portion of the District of Algoma south of the

49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2118-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Vansmit Ltd. o/a Jay-Dee Concrete Forming (Respondent)

Unit: "all construction labourers in the employ of Vansmit Ltd. o/a Jay-Dee Concrete Forming in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Vansmit Ltd. o/a Jay-Dee Concrete Forming in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (5 employees in unit)

2582-09-R: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Aqua Timber Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Aqua Timber Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Aqua Timber Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

2911-09-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. McLeod Bros. Mechanical Inc. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of McLeod Bros. Mechanical Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of McLeod Bros. Mechanical Inc. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (7 employees in unit)

2985-09-R: Labourers' International Union of North America, Local 625 (Applicant) v. Jones Group Ltd. (Respondent)

Unit: "all operating engineers in the employ of Jones Group Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (5 employees in unit)

2992-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. The Worx Group of Companies Ontario Ltd., Construction Worx Ontario Ltd. and, Concrete Worx Ltd. and, Earth Worx Ontario Ltd. (Respondents)

Unit: "all construction labourers in the employ of Concrete Worx Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Concrete Worx Ltd. in all sectors of the construction industry in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2998-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Anglo Painting Contractors Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Anglo Painting Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Anglo Painting Contractors Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (7 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0222-09-R: Laurentian University Staff Union (Applicant) v. Laurentian University of Sudbury (Respondent) v. United Steelworkers (Intervener)

Unit: "all Security Officers in the employ of Laurentian University of Sudbury, save and except supervisors, persons above the rank of supervisor, night watchmen, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (15 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	2

0770-09-R: Laurentian University Staff Union (Applicant) v. Laurentian University of Sudbury (Respondent)

Unit: "all Security Officers in the employ of Laurentian University of Sudbury regularly employed for not more than 24 hours per week, save and except Director, Security and Parking Services and persons above the rank of Director, watchmen, persons regularly employed for more than 24 hours per week, and students employed during the school vacation period" (6 employees in unit)

1706-09-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. H.A.P. Mechanical Services Limited (Respondent)

Unit: "all journeyperson and apprentice refrigeration and air-conditioning mechanics and maintenance mechanics employed by H.A.P. Mechanical Services Limited performing maintenance and/or service work at and out of the City of London, Ontario, save and except persons above the rank of working foreperson" (4 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4

Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2264-09-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Machar (Respondent)

Unit: "all employees employed by the Corporation of the Township of Machar in the District of Parry Sound, save and except Supervisors and persons above the rank of Supervisor, the Clerk-Administrator, and students employed during the summer vacation period" (9 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	3

2449-09-R: Public Service Alliance of Canada (Applicant) v. OMNI Facility Services Canada Limited (Respondent)

Unit: "all employees of OMNI Facility Services Canada Limited, at Canadian Forces Base Petawawa, save and except inspectors, supervisors and persons above the rank of supervisor" (100 employees in unit)

Number of names of persons on revised voters' list	110
Number of persons who cast ballots	79
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	67
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	8

2949-09-R: United Food & Commercial Workers, Local 206 (Applicant) v. 1089357 Ontario Limited c.o.b. as Cannon Security and Patrol Services (Respondent)

Unit: "all employees of 1089357 Ontario Limited c.o.b. as Cannon Security and Patrol Services employed as security guards at Lot 37, 1 Summers Lane and Local 68, 32 York Blvd. in the City of Hamilton save and except patrol supervisors, persons above the rank of patrol supervisor, client service representatives, sales, staff, managers, dispatchers, central station operators, secretarial staff, clerical and office staff, casual employees and persons who are licensed under the Private Security and Investigative Act 2005 and employed as private investigators" (15 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

2991-09-R: Service Employees International Union Local 2, Brewery, General and Professional Workers Union (Applicant) v. Domus Building Cleaning Company Limited (Respondent)

Unit: "all employees of Domus Building Cleaning Company Limited working at 45 Gurudwara Rd., in the City of Ottawa, save and except supervisors and persons above the rank of supervisor" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3003-09-R: Workers United Ontario Council (Applicant) v. Sleep Country Canada (Respondent) v. UNITE HERE (Intervener)

Unit: "all Associates of Sleep Country Canada, in the City of Toronto, save and except coordinators, persons above the rank of coordinator, office and clerical staff (including customer service representatives and inspectors)" (62 employees in unit)

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

1915-06-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Bonnechere Excavating Inc. (Respondent)

1216-08-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. 587435 Ontario Inc. (o/a DRD Construction Services) (Respondent)

0528-09-R: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Applicant) v. Henry Heyink Construction Ltd. (Respondent) v. Labourers International Union of North America, Ontario Provincial District Council (Intervener)

2463-09-R: International Brotherhood of Electrical Workers, Construction Council of Ontario, (Applicant) v. Kingdom Construction Limited, (Respondent) v. Construction Workers Local 52, affiliated with the Christian Labour Association of Canada (Intervener) (Endorsed Settlement)

Applications for Certification Dismissed Subsequent to Vote

0512-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Formtech Thunder Bay Incorporated (Respondent)

Unit: "all labourers, all carpenters and carpenters' apprentices and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of the responding party in the District of Thunder Bay, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

1968-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Eden Oak Homes and/or Eden Oak Homes Inc. and/or Rom Management Inc. (Respondent)

Unit: "all construction labourers in the employ of Eden Oak Homes Inc. and ROM Management Inc. in the County of Simcoe and the District Municipality of Muskoka, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

1459-09-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Hudson's Bay Company (Respondent)

Unit: "all employees of Hudson's Bay Company - Toronto Logistics Centre and/or Hudson's Bay Company Ltd. - Toronto Logistics Centre located at 145 Carrier Drive, in the city of Etobicoke, save and except, supervisors, those above the rank of supervisor, office personnel, security personnel, seasonal/casual workers, temporary/agency workers, drivers and vehicle fleet maintenance personnel" (85 employees in unit)

Number of names of persons on revised voters' list	102
Number of persons who cast ballots	98
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	85
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	49
Number of ballots segregated and not counted	1

2764-09-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. 6N Silicon Inc. (Respondent)

Unit: "all employees of 6N Silicon Inc. in the City of Vaughan, save and except supervisors and those above the rank of supervisor, R&D technicians, R&D scientists, engineers and office, clerical, and sales staff." (50 employees in unit)

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	56
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	49
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	7

2793-09-R: Ontario Public Service Employees Union (Applicant) v. Sports Medic Niagara Regional Patient Transfer Services (Respondent)

Unit: "all employees of Sports Medic, Niagara Regional Patient Transfer Services working in and out of the Region of Niagara save and except supervisors and those above the rank of supervisor." (17 employees in unit)

2975-09-R: Teamsters Local Union No. 419 (Applicant) v. Ryder Truck Rental Canada Ltd. (Respondent)

Unit: "all employees of the Ryder Truck Rental Canada Ltd., working at or out of 1249 Kennedy Road, Scarborough, excluding supervisors, persons above the rank of supervisor, office, clerical and sales staff" (10 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

3599-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Niacon Limited (Respondent)

1063-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Tas-Mari Inc. and/or, 1475934 Ontario Ltd. and/or, 2144121 Ontario Inc. and/or, 2174372 Ontario Ltd. and/or, Highcastle Homes Inc. (Respondents)

1363-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Cope Construction & Contracting Inc. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 1256, International Union of Operating Engineers, Local 793 (Interveners)

1841-09-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Premi-Air Inc. (Respondent)

2810-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Fleischauer Brothers Landscaping Ltd. (Respondent)

3020-09-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. MJ Manufacturing - A Division of Martinrea International Inc. (Respondent)

3035-09-R: Teamsters Local Union No. 879 (Applicant) v. Synnex Canada Inc. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0012-08-R: The International Union of Painters and Allied Trades, Local 114 (Applicant) v. Wayne Howran c.o.b. as Vision Glass & Windows and, Vision Glass Inc. (Respondents) (Endorsed Settlement)

0059-08-R: The Formwork Council of Ontario (Applicant) v. Gotham Structural Group Inc., Durocast Structural Group Inc. and, 2137161 Ontario Inc. (Respondents) v. Canadian Construction Workers Union (Intervener) (Endorsed Settlement)

0667-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. WB & B Masonry Inc. and, Woodstock Brick & Block (Respondents) v. Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Intervener) (Terminated)

0678-08-R: Brick and Allied Craft Union of Canada (Applicant) v. WB & B Masonry Inc. and, Woodstock Brick & Block (Respondents) v. Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Intervener) (Terminated)

0308-09-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Douglas Barwick Inc., Alloytec Mechanical Inc., Bohler-Uddeholm Ltd. (Respondents) v. Canadian Pipe Fabricators Association (Intervener) (Withdrawn)

0908-09-R: International Union of Painters and Allied Trades, Local 557 (Applicant) v. Pinnacle Interiors Inc., Fine Decorating Ltd. (Respondents) (Granted)

1246-09-R: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. Florcan Inc., Florcan (2007) Inc. (Respondents) (Endorsed Settlement)

1683-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Quick Concrete Forming Ltd. and, Emanuel Torres Sodoma o/a Quick Concrete Forming (Respondents) (Terminated)

1746-09-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Hooper Welding Enterprises Limited (Respondent) (Withdrawn)

2465-09-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Versa Construction Limited, 539243 Ontario Limited o/a RCG Construction & Site Servicing, Rodan Site Servicing Ltd., Rodan Forming Ltd., Rodan Holdings Ltd., Rodan Group, an Unregistered Business Name (Respondents) (Withdrawn)

2846-09-R: International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mehmet Ozgur c.o.b. as Gold Star General Stucco, Drywall and Painting Company and/or, Gold Star Stucco Limited and/or, Enko Construction Limited (Respondents) (Withdrawn)

2921-09-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Lopes Drywall & Acoustics Inc., Lopes Drywall & Acoustics Corp., 1743313 Ontario Ltd. o/a Lopes Drywall (Respondents) (Withdrawn)

SALE OF A BUSINESS

0012-08-R: The International Union of Painters and Allied Trades, Local 114 (Applicant) v. Wayne Howran c.o.b. as Vision Glass & Windows and, Vision Glass Inc. (Respondents) (Endorsed Settlement)

0059-08-R: The Formwork Council of Ontario (Applicant) v. Gotham Structural Group Inc., Durocast Structural Group Inc. and, 2137161 Ontario Inc. (Respondents) v. Canadian Construction Workers Union (Intervener) (Endorsed Settlement)

0299-09-R: Construction Workers Local 52, affiliated with the Christian Labour Association of Canada (Applicant) v. Graham Group Ltd. and, Graham Construction and Engineering Inc. (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener) (Endorsed Settlement)

0308-09-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Douglas Barwick Inc., Alloytec Mechanical Inc., Bohler-Uddeholm Ltd. (Respondents) v. Canadian Pipe Fabricators Association (Intervener) (Withdrawn)

0908-09-R: International Union of Painters and Allied Trades, Local 557 (Applicant) v. Pinnacle Interiors Inc., Fine Decorating Ltd. (Respondents) (Granted)

1009-09-R: Power Workers' Union, CUPE Local 1000, C.L.C. (Applicant) v. Great Lakes Power Limited, Great Lakes Power Transmission Inc., Great Lakes Power Transmission LP, Great Lakes Power Distribution Inc., Brookfield Asset Management Inc. and, Brookfield Renewable Energy Power Inc. (Respondents) (Withdrawn)

1246-09-R: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. Florcan Inc., Florcan (2007) Inc. (Respondents) (Endorsed Settlement)

1683-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Quick Concrete Forming Ltd. and, Emanuel Torres Sodoma o/a Quick Concrete Forming (Respondents) (Terminated)

1746-09-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Hooper Welding Enterprises Limited (Respondent) (Withdrawn)

2465-09-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Versa Construction Limited, 539243 Ontario Limited o/a RCG Construction & Site Servicing, Rodan Site Servicing Ltd., Rodan Forming Ltd., Rodan Holdings Ltd., Rodan Group, an Unregistered Business Name (Respondents) (Withdrawn)

2846-09-R: International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mehmet Ozgur c.o.b. as Gold Star General Stucco, Drywall and Painting Company and/or, Gold Star Stucco Limited and/or, Enko Construction Limited (Respondents) (Withdrawn)

2921-09-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Lopes Drywall & Acoustics Inc., Lopes Drywall & Acoustics Corp., 1743313 Ontario Ltd. o/a Lopes Drywall (Respondents) (Withdrawn)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0634-08-R: Daniel Wilson (Applicant) v. Labourers' International Union of North America - Construction and Allied Workers, Local 607, and, Labourers' International Union of North America, Ontario Provincial District Council (Respondents) (Dismissed)

Unit: "all construction labourers in the employ of Superior in all sectors other than the industrial, commercial and institutional sector of the construction industry in the District of Thunder Bay" (5 employees in unit)

2686-08-R: Construction and Allied Workers Local Union 607 and, Labourers' International Union of North America, Local 1036 (Applicants) v. Sparcon Construction Inc. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (Withdrawn)

3075-08-R: Canadian Union of Public Employees (Applicant) v. Compass Group Canada (Respondent) v. UNITE HERE Ontario Council and its Local 2767 (Intervener) (Withdrawn)

2789-09-R: David Legg (Applicant) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) and its Local 504 (Respondent) v. Samuel Metal Processing (A Division of Samuel Son & Co. Limited) (Intervener) (Terminated)

Unit: "all employees of Samuel Metal Processing, A Division of Samuel Son & Co., Limited in the City of Hamilton, Ontario, save and except supervisors and persons above the rank of supervisor, office, clerical, and sales staff and persons employed for not more than twenty-four (24) hours per week* and students employed during the summer vacation." (71 employees in unit)

Number of names of persons on revised voters' list	69
Number of persons who cast ballots	56
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	56
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	19
Number of ballots marked against respondent	37
Number of ballots segregated and not counted	0

3011-09-R: Gerald Washington (Applicant) v. United Food & Commercial Workers Union, Local 206 (Respondent) v. Alsco Uniform & Linen Service Ltd. and/or Alsco Canada Corp. (Intervener) (Withdrawn)

Unit: "all employees of Alsco Uniform & Linen Service Ltd. and/or Alsco Canada Corp. in Burlington, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, drivers, students employed for the school vacation period, and persons regularly employed for not more than 20 hours per week." (32 employees in unit)

3114-09-R: Rafael De Miquelerena (Applicant) v. Retail, Wholesale Canada CAW Division Local 462 (Respondent) (Terminated)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3235-07-U: International Union of Operating Engineers, Local 793 (Applicant) v. TWD Roads Management Inc. (Respondent) (Withdrawn)

3449-07-U: Dave Harris (Applicant) v. Service Employees International Union, Local 1.on (Respondent) v. YWCA Hamilton (Intervener) (Withdrawn)

0367-08-U: Paul Barber (Applicant) v. Maintenance and Construction Skilled Trades Council (Respondent) v. Toronto District School Board (Intervener) (Dismissed)

0668-08-U: Labourers' International Union of North America, Local 1059 (Applicant) v. WB & B Masonry Inc., Woodstock Brick & Block, Graceview Enterprises Inc., Construction Workers Local 53, Christian Labour Association of Canada, Robert Wubs, Keith Francis and, Harold Chordash (Respondents) (Terminated)

0679-08-U: Brick and Allied Craft Union of Canada (Applicant) v. WB & B Masonry Inc., Woodstock Brick & Block, Graceview Enterprises Inc., Construction Workers Local 53, Christian Labour Association of Canada, Robert Wubs, Keith Francis and, Harold Chordash (Respondents) (Terminated)

2136-08-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Porpealia Repair Ltd. (Respondent) v. Essar Steel Algoma Inc. (Intervener) (Withdrawn)

2687-08-U: John McKenney (Applicant) v. The Ontario Secondary School Teachers' Federation, District 26 (Respondent) v. Upper Canada District School Board (Intervener) (Dismissed)

2785-08-U: Labourers' International Union of North America, Ontario Provincial District Council and, Construction and Allied Workers, Local Union 607 (Applicants) v. A1 Superior Paving & Concrete Works Company Inc. and Marco Vallelunga, Luigi Vallelunga and Daniel Wilson (Respondents) (Dismissed)

2795-08-U: Porpealia Repair Ltd. (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. Essar Steel Algoma Inc. (Intervener) (Withdrawn)

3274-08-U: Sheryl Toop (Applicant) v. CUPE Local 1974, Canadian Union of Public Employees (Respondents) v. The Board of Governors of the Kingston Hospital (Intervener) (Dismissed)

0708-09-U: Cory Nichols (Applicant) v. Workers United (Respondent) v. Great Lakes Recreational Products Inc. (Intervener) (Withdrawn)

0835-09-U: Mahassen Mahmoud (Applicant) v. Canadian Union of Public Employees and its Local 3393 (Respondent) (Dismissed)

0903-09-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Formtech Thunder Bay Incorporated and Vic Miller (Respondent) (Withdrawn)

1049-09-U: Canadian Union of Public Employees (Applicant) v. Compass Group Canada (Respondent) v. UNITE HERE Ontario Council (Intervener) (Withdrawn)

1064-09-U: Jennifer Connor, Darlene Bolger, Bonnie Caldwell, Kate Michalska, Rhonda Storms, Maggie Granville, Wendi Hudson, Theresa (Terrie) Hoey, Paula Johnson-Young, Christina Wood, Olivia Rowe-Ovens, Andrea Cassidy, Amey Cancian, Leonor Buck, Peggy Cross and Leeanne Amell (Applicant) v. CUPE Local 1479 (Respondent) v. Algonquin & Lakeshore Catholic District School Board (Intervener) (Withdrawn)

1403-09-U: Errol Dennis Penn (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada & Its Local 973 (Respondent) v. Coca Cola Enterprises Inc. (Intervener) (Dismissed)

1431-09-U: Gregory Barton (Applicant) v. Canadian Autoworkers Local 222 (Respondent) v. General Motors of Canada Limited (Intervener) (Withdrawn)

1701-09-U: Alan Ryan (Applicant) v. Keeprite Workers' Independent Union (Respondent) v. National Refrigeration and Air Conditioning Canada Corp. (Intervener) (Dismissed)

1742-09-U: Gordon Lewer (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) v. Hamilton-Wentworth District School Board (Intervener) (Dismissed)

1745-09-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Hooper Welding Enterprises Limited (Respondent) (Withdrawn)

1871-09-U: Patsy Broomfield-White (Applicant) v. Canadian Union of Public Employees (CUPE) Local 501 (Respondent) v. University Health Network (Intervener) (Dismissed)

2129-09-U: International Brotherhood of Electrical Workers, Local 1739, Scott Curran (Applicant) v. 1693377 Ontario Inc. o/a KB Electrical (Respondent) (Withdrawn)

2305-09-U: Labourers' International Union of North America, Local 625 (Applicant) v. Trojan Interior Contracting (2002) Ltd., Greater Ontario Regional Council of Carpenters & Allied Workers, Local 494 (Respondents) (Withdrawn)

2314-09-U: Jimesleck Therassan (Applicant) v. Teamsters Local 91 (Respondent) v. Loblaws Companies Limited (Intervener) (Withdrawn)

2317-09-U: Milan Todorovic (Applicant) v. C.A.W. - Local 1917 (Respondent) v. Hitachi Construction Truck Manufacturing Ltd. (Intervener) (Dismissed)

2455-09-U: Norman Traversy (Applicant) v. Mississauga Professional Firefighters' Association, Local 1212 (Respondent) v. The Corporation of the City of Mississauga (Intervener) (Dismissed)

2458-09-U: Eva Moritz (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (Withdrawn)

2473-09-U: Morgan Swanson (Applicant) v. UNITE HERE Local 75 (Respondent) v. Le Meridien King Edward (Intervener) (Withdrawn)

2704-09-U: International Brotherhood of Electrical Workers, Construction Council of Ontario (Applicant) v. Kingdom Construction Limited (Respondent) v. Construction Workers Local 52, affiliated with the Christian Labour Association of Canada (Intervener) (Endorsed Settlement)

2745-09-U: International Association of Machinists and Aerospace Workers (Applicant) v. Voyageur Patient Transfer Services Inc. (Respondent) (Withdrawn)

2794-09-U: Ontario Public Service Employees Union (Applicant) v. Sports Medic Niagara Regional Patient Transfer Services (Respondent) (Withdrawn)

2835-09-U: Doug Lyon (Applicant) v. CAW Local 222 (Respondent) (Dismissed)

2948-09-U: International Union of Operating Engineers, Local 793 (Applicant) v. JBL Construction, (A Division of 1644472 Ontario Limited) (Respondent) (Endorsed Settlement)

2999-09-U: Ontario Nurses' Association (Applicant) v. 1245556 Ontario Inc. Operating As Burton Manor (Respondent) (Withdrawn)

3028-09-U: Daljit Mann (Applicant) v. Cara Operations Limited o/a Cara Airline Solutions (Respondent) (Withdrawn)

APPLICATION FOR INTERIM ORDER

2472-09-M: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Lincare Ltd. (Respondent) (Withdrawn)

2536-09-M: Universal Workers Union, Labourers' International Union of North America, Local 183 on its own behalf and on behalf of its Members and Executive Board (Applicant) v. Labourers International Union of North America; Joseph S. Mancinelli, Ronald A. Pink, Q.C. and, Cosmo Manella (Respondents) (Dismissed)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2892-09-M: Hampton Inn and Suites (Applicant) v. United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Respondent) (Granted)

2893-09-M: Toro Aluminum (Applicant) v. United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Respondent) (Granted)

JURISDICTIONAL DISPUTES

0941-09-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. PCL Constructors Canada Inc. and, International Brotherhood of Electrical Workers, Local 804 (Respondents) v. The Plan Group (Intervener) (Withdrawn)

0942-09-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. PCL Constructors Canada Inc. and, Millwright Local Union 1916 (Respondents) v. International Brotherhood of Electrical Workers, Local 804, The Plan Group (Interveners) (Withdrawn)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1819-09-OH: International Brotherhood of Electrical Workers, Local 1739, Brendan Phillips (Applicant) v. 1693377 Ontario Inc. o/a KB Electrical (Respondent) (Withdrawn)

2593-09-OH: Donald Watson (Applicant) v. Tega Developments Inc. (Respondent) (Withdrawn)

2757-09-OH: Justin Amo (Applicant) v. Pembroke Honda (Respondent) (Withdrawn)

2815-09-OH: Anthony Diego Badali (Applicant) v. Protrans Personnel Services Inc. (Respondent) (Withdrawn)

2960-09-OH: Stephanie Brody (Applicant) v. Ontario Society (Coalition) of Senior Citizens' Organizations (Respondent) (Terminated)

CONSTRUCTION INDUSTRY GRIEVANCES

1931-06-G: International Union of Painters and Allied Trades Local 1891 (Applicant) v. Multi Wall and Ceiling Systems Limited;, 714232 Ontario Ltd. o/a Pro Drywall and, Frontline Contracting Inc. (Respondents) (Withdrawn)

0058-08-G: The Formwork Council of Ontario (Applicant) v. Gotham Structural Group Inc. and, Durocast Structural Group Inc. (Respondents) v. Canadian Construction Workers Union (Intervener) (Endorsed Settlement)

0356-08-G: The Formwork Council of Ontario (Applicant) v. Durocast Structural Group Inc. (Respondent) v. Canadian Construction Workers Union (Intervener) (Endorsed Settlement)

1701-08-G: International Union of Bricklayers and Allied Craftworkers, Local 6 (Applicant) v. Global Brick & Stucco (Respondent) (Withdrawn)

3510-08-G: Quality Control Council of Canada (Applicant) v. Axiom NDT Corporation (Respondent) (Dismissed)

0647-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. MapleCon Earthworks Ltd. (Respondent) (Withdrawn)

0648-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. MapleCon Earthworks Ltd. (Respondent) (Withdrawn)

1245-09-G: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. Florcan (2007) Inc. (Respondent) (Endorsed Settlement)

1507-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. JH & Sons Ltd. (Respondent) (Granted)

1681-09-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Quick Concrete Forming Ltd. and Emanuel Torres Sodoma o/a Quick Concrete Forming (Respondent) (Terminated)

2466-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Versa Construction Limited (Respondent) (Withdrawn)

2487-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Terrastone Construction Inc. (Respondent) (Granted)

2554-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinfter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Ducan Ceiling & Walls Systems of Oshawa Limited (Respondent) (Endorsed Settlement)

2742-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers District Council of Ontario and its Local 765 (Applicant) v. X-Act Contracting Ltd. (Respondent) (Withdrawn)

2753-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinfter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Ducan Ceiling & Walls Systems of Oshawa Limited (Respondent) (Granted)

2756-09-G: Skyway Canada Limited (Applicant) v. Carpenters & Allied Workers, Local 1256 United Brotherhood of Carpenters and Joiners of America (Respondent) (Withdrawn)

2791-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Edward Kosciuch c.o.b. as All City Drywall (Respondent) (Granted)

2792-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. YAG Limited (Respondent) (Terminated)

2802-09-G: Brick and Allied Craft Union of Canada, Local 1 (Applicant) v. Limen Masonry Limited., Limen Group Ltd.., Limen Masonry (2003) Inc.., Limen Enterprises (2003) Inc.., Jomil Renovations Ltd.(formerly Acmar Masonry Inc. and Acmar Group Ltd.), Masonry Industry Employers' Council of Ontario (Respondents) (Terminated)

2824-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446 Local 494, Local 785, Local 1669, Local 1946, Local 2222, Local 2486, Herinafter known as ("Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Interior Technologies Ltd. (Respondent) (Granted)

2825-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 2222, Local 2486 hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds" (Applicant) v. Terrastone Construction Inc. (Respondent) (Granted)

2829-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. B&B Millwork Inc. (Respondent) (Granted)

2842-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. United Contracting (London) (Respondent) (Withdrawn)

2845-09-G: International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mehmet Ozgur c.o.b. as Gold Star General Stucco, Drywall and Painting Company and, Gold Star Stucco Limited and, Enko Construction Limited (Respondents) (Withdrawn)

2853-09-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Durham Painting & Decorating Ltd. (Respondent) (Granted)

2887-09-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Omega General Construction Inc. (Respondent) (Withdrawn)

2898-09-G: Labourers' International Union of North America, Local 625 (Applicant) v. Blaze Protect/Allabate (BPI) (Respondent) (Granted)

2908-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C.F. Concrete & Drain Inc. (Respondent) (Granted)

2912-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Benforest Developments Inc. and, Brian J. Cater (Respondents) (Endorsed Settlement)

2916-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. MapleCon Earthworks Ltd. (Respondent) (Withdrawn)

2942-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. B&B Millwork Inc. (Respondent) (Granted)

2952-09-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Menkes Developments Inc. (Respondent) (Endorsed Settlement)

2958-09-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. A Plus General Contractor Corp. (Respondent) (Granted)

2981-09-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Purnell Sheet Metal Ltd. (Respondent) (Withdrawn)

2995-09-G: Labourers' International Union of North America, Local 527 (Applicant) v. Presto Construction Inc. (Respondent) (Endorsed Settlement)

3000-09-G: The International Union of Painters and Allied Trades, Local Union 200 (Applicant) v. Westmount Storefront Systems Ltd. (Respondent) (Withdrawn)

3007-09-G: Labourers' International Union of North America Local No. 625 (Applicant) v. Bridge Tite Group (Respondent) (Withdrawn)

3010-09-G: Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. 14457601 Ontario Inc. c.o.b. as A & D Enterprise (Respondent) (Granted)

3016-09-G: Labourers' International Union of North America, Local 1059 (Applicant) v. United Contracting (London) (Respondent) (Withdrawn)

3022-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Orlando Corporation (Respondent) (Endorsed Settlement)

3049-09-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Graves Roofing Ltd. (Respondent) (Endorsed Settlement)

3074-09-G: Sheet Metal Workers' International Association Local 30 (Applicant) v. H & R Canada Inc. (Respondent) (Granted)

3080-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant)v. Raywin Industries Limited (Respondent) (Granted)

APPEALS - EMPLOYMENT STANDARDS ACT

1025-07-ES: TRG Customer Solutions Inc. (Applicant) v. Aimerance Kabongo, and, Director of Employment Standards (Respondents) (Granted)

1768-07-ES: Wilmor Lawn Care Inc., c.o.b. Nutri-Lawn York Region North (Applicant) v. Mike Hinton and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3928-07-ES: B C & C Professional Corporation (Applicant) v. Murray Dickson, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3929-07-ES: B C & C Professional Corporation (Applicant) v. John Russell, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3325-08-ES: Glendale Golf and Country Club, Limited (Applicant) v. Massimo Sanago and, Director of Employment Standards (Respondents) (Granted)

0379-09-ES: Tom Schnarr, a Director of 6497667 Canada Inc. o/a The Thirsty Toad (Applicant) v. Julia Croll and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0561-09-ES: Aivor Khourkine, a Director of Starwood Manufacturing Inc. and, Peter Prytula, a Director of Starwood Manufacturing Inc. (Applicants) v. Ronald Haggart, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0587-09-ES: Annette Podlacha (Applicant) v. Trott Transit Ltd. and/or Trott Tours Limited and , Director of Employment Standards (Respondents) (Granted)

0627-09-ES: 1610597 Ontario Inc. and Pro-Po Enterprises Inc. o/a Coffee Time (Applicant) v. Annette Gormier Scriver and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0728-09-ES: Ravenda Homes Ltd. (Applicant) v. Gavin Mollica and, Director of Employment Standards (Respondents) (Dismissed)

1035-09-ES: Tom Mckee o/a Spotlight Surveillance (Applicant) v. Robin Dale Houghton and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1056-09-ES: Lettuce Eatery 1204 Ltd. (Applicant) v. Fanos Tesfay and, Director of Employment Standards (Respondents) (Dismissed)

1204-09-ES: Certain Teed Gypsum Canada, Inc. (Applicant) v. Colleen Hall and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1362-09-ES: Littlefoot Private Home Daycare Inc. o/a Sunshine Lake Montessori Child Care Centre (Applicant) v. Parvin Khalifeh and, Director of Employment Standards (Respondents) (Withdrawn)

1614-09-ES: Brian G. Taub (Applicant) v. Rumanek & Company Ltd. and, Director of Employment Standards (Respondents) (Withdrawn)

1676-09-ES: Derek MacNaughton (Applicant) v. Carrington Homes (96) Inc. and, Director of Employment Standards (Respondents) (Dismissed)

1799-09-ES: Don Hendry (Applicant) v. Kawartha Metals Corp. and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1952-09-ES: Patty Rowsell (Applicant) v. 1743340 Ontario Ltd. o/a Free Range Meat Co. and, Director of Employment Standards (Respondents) (Withdrawn)

1996-09-ES: Mike Davidson (Applicant) v. Dale Edward Wynn o/a 4 Wynns Trucking and, Director of Employment Standards (Respondents) (Withdrawn)

1997-09-ES: Don Cooney (Applicant) v. Dale Edward Wynn o/a 4 Wynns Trucking and, Director of Employment Standards (Respondents) (Withdrawn)

2105-09-ES: Excel Employment Tempro Inc. (Applicant) v. Hrishikesh Baidya and, Director of Employment Standards (Respondents) (Dismissed)

2116-09-ES: J. Kazdan Limited (Applicant) v. Peter Terpstra and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2162-09-ES: Betina D. Hodak (Applicant) v. W.E.T. Automotive Systems Ltd., and, Director of Employment Standards (Respondents) (Withdrawn)

2183-09-ES: eHarvest.com Inc. (Applicant) v. Jennifer Jones and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2188-09-ES: 2166616 Ontario Inc. o/a Apple Jack's (Applicant) v. Hayden Erb and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2190-09-ES: 2166616 Ontario Inc. o/a Apple Jack's (Applicant) v. Tanya Missios and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2208-09-ES: Bruce G. Jones Forest Products Ltd. (Applicant) v. Pierre Bertrand and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2209-09-ES: Dr. Raad Hasan Sunba Dentistry Professional Corporation (Applicant) v. Ronda Giles and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2244-09-ES: Jay Patrick Pearson (Applicant) v. Auto Warehousing Company Canada Ltd., Director of Employment Standards (Respondents) (Endorsed Settlement)

2271-09-ES: Sun Beach Tanning Waterloo Inc. (Applicant) v. Nicole Mitchell and, Director of Employment Standards (Respondents) (Terminated)

2272-09-ES: Sun Beach Tanning Waterloo Inc. (Applicant) v. Crystal Nadjiwan and, Director of Employment Standards (Respondents) (Terminated)

2273-09-ES: Sun Beach Tanning Waterloo Inc. (Applicant) v. Michela Walsh and, Director of Employment Standards (Respondents) (Terminated)

2316-09-ES: Flowerland Florist (Applicant) v. Olga Kozachenko, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2320-09-ES: Little Bears Daycare (Applicant) v. Shannon Bernard and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2339-09-ES: Zeguo Qiu (Applicant) v. SICTEC Group Inc., and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2415-09-ES: Bobby Holmes (Applicant) v. Wild Wing (Brampton) Inc. and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2416-09-ES: Dawn Deane, a Director of Reading Rainbow Daycare and Learning Centre Inc. (Applicant) v. Amanda Horner and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2417-09-ES: Michael Deane, a Director of Reading Rainbow Daycare and Learning Centre Inc. (Applicant) v. Amanda Horner and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2447-09-ES: Bridge Tite Coatings Inc. (Applicant) v. Matthew D'Alimonte and, Director of Employment Standards (Respondents) (Dismissed)

2493-09-ES: Pro Oil Change (Applicant) v. Mike Rumas and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2503-09-ES: Card Sports & Entertainment Inc. (Applicant) v. Rory Montgomery and, Director of Employment Standards (Respondents) (Terminated)

2546-09-ES: 1225064 Ontario Ltd. o/a A & F 4 Season Maintenance Service (Applicant) v. Wayne Allen and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2548-09-ES: Susan Kathleen McNabb (Applicant) v. Fastenal Canada Company and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2552-09-ES: Tony Cudney (Applicant) v. Toromont Industries Ltd./Industries Toromont Ltée o/a Battlefield Equipment Rentals and, Director of Employment Standards (Respondents) (Terminated)

2651-09-ES: A.R.D. Industries Ltd. (Applicant) v. Bradley Cline and, Director of Employment Standards (Respondents) (Terminated)

2655-09-ES: Weathertech Restoration Services Inc. (Applicant) v. Wayne Miller and, Director of Employment Standards (Respondents) (Terminated)

2656-09-ES: Weathertech Restoration Services Inc. (Applicant) v. Justin Marion and, Director of Employment Standards (Respondents) (Terminated)

2695-09-ES: Executive Assistance Permanent and Temporary Staffing Solutions Inc. (Applicant) v. Helen Primorac, and, Director of Employment Standards (Respondents) (Withdrawn)

2696-09-ES: 2124195 Ontario Inc. o/a Savana Restaurant & Lounge; and Henriques Levy (Applicant) v. Sylvie F. Sagna and, Director of Employment Standards (Respondents) (Dismissed)

2738-09-ES: 1093834 Ontario Ltd. (Applicant) v. Chantal Visi, Director of Employment Standards (Respondents) (Endorsed Settlement)

2775-09-ES: Frank L. Norquay (Applicant) v. Noah's Natural Foods (Weston Road) Ltd. o/a Noah's Natural Foods, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

2777-09-ES: Golden Orchard Seniors Family Group Home (Applicant) v. Yevhen Kishka and, Director of Employment Standards (Respondents) (Dismissed)

2778-09-ES: Golden Orchard Seniors Family Group Home (Applicant) v. Hanna Kishka and, Director of Employment Standards (Respondents) (Dismissed)

2790-09-ES: David Maxwell a director of Kennedy Automation Limited (Applicant) v. Kazimierz Orzel and, Director of Employment Standards (Respondents) (Terminated)

3004-09-ES: 1703381 Ontario Inc. (Applicant) v. Brandy Mantini, and, Director of Employment Standards (Respondents) (Terminated)

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

2151-08-HS: National Steel Car (Applicant) v. United Steelworkers of America, Local 7135, John Pierroz, Inspector (Respondents) (Granted)

3449-08-HS: Stoneridge Manor (Applicant) v. Canadian Union of Public Employees Local 2564 and, Timothy Luesby, Inspector (Respondents) (Withdrawn)

0654-09-HS: Monica Menner (Applicant) v. Grand River Transit, Vic Harrison, Inspector (Respondents) (Withdrawn)

0786-09-HS: True North Hardwood Plywood Inc. (Applicant) v. United Steelworkers of America, Local 1-2995 and, Peter McDonagh, Inspector (Respondents) (Terminated)

0863-09-HS: Hallowell House (Applicant) v. Canadian Auto Workers and, Kenneth Hill, Inspector (Respondents) (Withdrawn)

COMPLAINTS UNDER THE SMOKING IN THE WORKPLACE ACT

2728-09-M: Elaine Howarth (Applicant) v. Homelife/Realty One Ltd. (Respondent) (Withdrawn)

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

2522-09-PS: The Religious Hospitallers of St. Joseph of Cornwall, Ontario, operating as St. Joseph's Continuing Care Centre, Hotel Dieu Hospital and St. Joseph's Villa (Applicant) v. Canadian Union of Public Employees, Ontario Public Service Employees Union, Ontario Nurses Association (Respondents) (Withdrawn)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1468-09-R: International Union of Operating Engineers, Local 793 (Applicant) v. GTA Concrete Enterprises Ltd. and, GTA Concrete Pumps Inc. (Respondents) (Dismissed)

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